2965 Mr. Burnell: Are they the same in general character as Mrs. Rindge's remarks?

A. 'Mr. Ostrom: I live up there. I went over the road you propose to build in Castiac. If you propose to do that over Silver (something) over there, there would be about 16 feet there, and it would cost over $7,000 a mile to build a road over there. Now, I am going to wait until the war is over and buy me an aero-
2966 plane, but I simply mean I won't go down to Billy Sunday and have a change of heart.

'Supervisor McClellan: I second the motion.'

And the motion was carried. That is all.

The Court: What man was that who made the motion? A. Mr. Woodley's motion that this matter be taken under advisement."

This witness, Minnie O. Smalley, also testified that as such stenographic reporter of the proceedings of the said board of supervisors,
2[illegible] she was present and took down the proceedings of the said board at its meeting of May 27th, 1918, to the best of her ability.

"Mr. Vallee: The second meeting. Miss Smalley has written her notes up of that meeting, and we have only one copy. I thought we might stipulate that she may read from the copy, or we can read it.

Mr. Anderson: She may read from the copy, or if you would like, I will read from the copy.

2968 The Court: It is agreed that Miss Smalley may read.

Mr. Anderson: This copy is correct, to the best of your knowledge, Miss Smalley? A. Yes, sir.

Mr. Vallee: I will read it, and then Miss Smalley may go.

Mr. Newby: I wish to suggest that when counsel reads Mr. Newby's speech that he give
2969 the proper modulation.

The Court: Perhaps we had better let Mr. Newby read it.

Mr. Newby: I have no objection to his reading it.

Mr. Anderson: We want it read into the record.

The Court: You read it, Mr. Vallee. Will Miss Smalley be required any longer?

Mr. Anderson: Let me make this suggestion,
2970 that if you have anything further to offer from her, we are willing to take it up out of order and read it after she is excused.

Mr. Burnell: We can send for her if we need her. I think we have covered everything on that.

Mr. Vallee: I will read it:

'Proceedings of the Board of Supervisors *in re* Malibu Road, May 27th, 1918. Present: Supervisors Hamilton, Dodge, McClellan, and Delorey.

2971 'Mr. Hamilton: The next special order will be this hearing on petition for abandonment of proceedings for opening road through Malibu Ranch. Will the clerk read the petition?

'(Clerk reads petition dated May 8th, signed by May K. Rindge, etc.)'

Mr. Anderson: It may be stipulated that that is the petition that is already in evidence.

Mr. Vallee: Already in evidence, yes.

2972 'Mr. Hamilton: What is the pleasure of the board in regard to this matter? I suppose we had better hear the petitioners first, and then give those of a different mind a hearing.

'Mr. Nathan Newby: Mr. Chairman and gentlemen of the board: We file this on behalf of the Rindge Company, and the statements of fact herein represent the basis of our contention and in support of the petition as filed. The board doubtless are quite familiar with the his-

2973 tory of this opening. The suit has been pending for the condemnation of the Malibu Ranch for a number of years, that is, the big suit for the large portion of the property, and as stated in the petition, long prior to the declaration of war by the United States. I take it that it is not now a subject of discussion as to whether or not the public necessity requires the opening of that road as of the date of filing of the suit or the passing of the declaration of intention that it would be opened. I take it that it would not

be a proper time or place to decide that question, because we are assuming for the purposes of this argument that if it was the proper exercise of the discretion of this board in the public interest to open the road at that time, that an entirely new situation now confronts the board and confronts everybody in this county, which absolutely requires a reconsideration of that declaration in the light of the new facts. I take it also that it is not necessary to call the attention of this board, but all of us will realize that the Congress of the United States, in recognition of the fact that the United States is up against the most colossal proposition that has ever been presented to vindicate those high principles upon which our Declaration of Independence was founded, and for which we entered into this war; that we must conserve our energies and concentrate all our resources in order to win this war. In other words, all of us have recognized that whatever may have been proper anterior to the war, that there is just one question presented to the American people and every political subdivision of the American people at the present time, and that is, all our resources, physical, financial and every other kind must be mobilized and concentrated upon this supreme issue of defeating autocratic Germany and all it stands for. In consideration of that provision, Congress of the United States passed this

law to which we refer, and certainly the spirit of that law as interpreted by the Capital Issues Committee at Washington and its sub-committee in California applies to just such a proposition as presented here. You will remember that the city has recognized already that it does apply and they are proposing on every proposition on which they have not passed beyond the stage they can stop without serious loss, to abandon those proceedings until after the war. As to a few of the proceedings that had gone so far the city attorney ruled that it would be impossible to abandon the proceedings without serious loss, what are they proposing to do? Not that they will go on regardless of the opinion of the Capital Issues Committee, but that they will at this time make application to that committee for permission to proceed and to issue the necessary securities or expend the necessary money. It may be said that you don't propose to issue any bonds, but you can't condemn this piece of property and spend money down there without coming within the spirit and the meaning of this law to which I am referring, and as indicated, the attitude of the Federal Government with reference to these matters, they are even extending the application of the law to foreign countries. Doubtless you saw in your papers last week that Mr. Elliott, the collector of customs, to whom is delegated the duty of enforcing this

2980 law in this regard, refused to permit supplies for road building purposes to go to Mexico, for this very reason that we must conserve those supplies for the purpose of sending them to our allies across the seas to win the war.

'Now, I think in your hearing in a recent session of the supervisors of the state, Judge Bledsoe made a statement which was applauded, and doubtless all of us applaud as correctly
2981 interpreting the spirit of this law as it should be applied to every public improvement that requires the expenditure of money, the expenditure of labor, and any of those things that might be used for this higher and more important purpose, however important this other may be in peace times. What was it he said? (Reads from newspaper clipping.)'

Have you got that newspaper clipping?

Mr. Newby: I will try and find it. I don't
2982 know whether I can or not.

Mr. Vallee: I will proceed with the reading. 'Now, that is simply but a simple statement that we all agree to, and doubtless resolutions were passed by the state board of supervisors emphasizing and approving that sentiment. Now it cannot be contended here that this comes within any exceptions mentioned there. What reason is there why, if this is a desirable public improvement, it could not wait until after the war is over, even though the war should last seven

2983 years? People that may have been living up there and claiming that they need this road to get out doubtless have been living there for a number of years, and they certainly would not be so unpatriotic as to say that if necessary to use the same method of transportation or means of exit from their present places of abode for the next two or three years until the war should be completed, if it should last that long, as
2984 they have been doing heretofore, they will not do so. They certainly could not expect the county to expend thousands of dollars in order to furnish them a right of way to get out if it would violate the spirit of this act I am talking about and the spirit that seems to be uniformly applied by all of the cities and boards of supervisors throughout the country. I violate no confidence in saying that Mr. Sartori, the representative of the Capital Issues Committee of
2985 this state, has told me what he will undoubtedly tell any member of this board, that boards of supervisors and city councils all over the United States are now submitting their budgets to the Capital Issues Committee before they will inaugurate any new improvement that requires the expenditure of any considerable sum of money. Therefore we say that we are absolutely confronted by this changed condition of affairs that requires new treatment. Now, a great deal of money has already been spent in useless litiga-

2986 tion over this Malibu road proposition, and while it has been suggested that this new proposition would not cost much money, I submit that the report of your own surveyor will show that it will cost a great deal of money if you condemn this right of way and build the road. It has been suggested, I notice, in the public press that all you propose to do is to condemn the road and then not build the right of way. That
2987 defeats the whole argument. If all you propose to do is to condemn the right of way—which I submit will cost some money even in that case—and do not propose to build the road, then all of this argument about furnishing a highway for the suffering settlers in that neighborhood falls to the ground, because you propose to make it simply a mental kind of highway, a theoretical highway without building the actual road. Therefore we submit that we ought to
2988 confront this question fairly and say that if you take the first step of getting the decree of condemnation it necessarily follows that you mean thereby to say that you will ultimately complete the road; otherwise you are simply bothering the litigants for nothing, because it will not get the highway if you don't propose to spend the money to accomplish that purpose. Now, it seems to me there are just two question here today. First, are we ready to harmonize the action of the board of supervisors

of this county with the announced policy of the Federal Government, with which policy all of us, I take it, are in perfect harmony; in other words, as patriotic American citizens, we are ready to forget for the moment our private interest and convenience and say, yes, until the war is over we concentrate all of our money, all of our man-power and all of our labor on winning this war. When that is over, it will be time enough to fight out our many differences over location of roads and the like.

'Now, as to the cost, of course there have been some estimates made, and as I understand it, our estimate stated in the petition is not far afield of the amount that would be required to build a highway such as has been suggested, and the few people who are living in this neighborhood that would be benefited by the building of this road, I take it, are not yet ready to advance to this board that in these war times that the private convenience of the half dozen or dozen, it may be, who may be there, would be willing to place an obstacle in this larger policy that is announced by the Government, in which we are all acquiescing, because if you once let the bars down and say you will do it here, then you will be called upon to do it somewhere else, and this announced policy will have no beginning and no ending. In other words, the exceptions will be so numerous that the policy will not

2992 amount to anything. The gentleman facetiously remarked about the interest that is taken in this proceeding, and assuming that all the gentlemen and ladies whom I see here are interested in this special proposition. Doubtless we are indebted to our friend there for getting them here, and I want to read his letter. It is entirely an improper issue that is presented here, and not the basis of our proposition. It is printed in the
2993 Santa Monica paper. It says:—

'Mr. Hill: I have not seen it.

'(Mr. Newby reads letter by County Counsel Hill printed in Santa Monica paper.'

Have you got that?

Mr. Newby: We have a copy of it. I think I can find it.

Mr. Anderson: Here is the letter that appeared in the Santa Monica paper.

Mr. Vallee: I will read it:

2994 'Secretary, Santa Monica-Ocean Park Chamber of Commerce:

Santa Monica, California.

Gentlemen:

I beg to call your attention to the fact that a hearing is set before the board of supervisors for Monday, May 27th, 1918, at 2 p. m., at which time the representative of the Rindge interests will make an effort to obtain action from the board of supervisors of Los Angeles county

2995 looking to the dismissal of the condemnation case of the Malibu road.

'We have had the matter up with Mr. McClellan, who is with us to the finish, and I take this opportunity of advising you, who are so vitally interested in this project that you may lend us your help in securing this road.

Hoping you may see your way clear to have a large delegation present at the hearing, I beg
2996 to remain

Respectfully yours,
A. J. HILL, *County Counsel.*

'Mr. Newby: And doubtless as a result of Mr. Hill's earnest invitation, a great many of our very best people in Los Angeles are here, and I want to join with him in congratulating our public spirited citizens that they are here so that they can hear the basis of our application. I believe the Santa Monica Chamber of
2997 Commerce issued a proclamation and letter in which they promised to furnish free automobile rides to all who wanted to be here, and however they may have been transported they are here, and I want to say to them as God-fearing American citizens, I congratulate them on being here to hear the basis of our application, and I would like for any one of them, or their representatives, today that are in harmony with this Federal policy that has been pronounced, and if they are willing to abide by that I make this

challenge, that instead of passing a resolution absolutely abandoning it during the war, that you put it up to the Capital Issues Committee to say whether or not this is a war essential that you should build this road, or whether in the interest of patriotism it ought to be postponed until after the war, and I am sure that if this committee, composed of patriotic American citizens, some of them residing in our own city, will say that the proposed condemnation of this road will contravene this announced policy, they will as good citizens be brought to acquiesce in that policy and postpone this whole business until we shall have licked Kaiser Bill and made the world safe for democracy, which we are going to do ultimately, of course.

'Just one other point and I will have had my say. Notwithstanding the announced conviction of Mr. Hill that 'Mr. McClellan is with us,' thereby identifying him with the opposition to this petition to the finish, because it is in his district, I want to say that I believe Mr. McClellan—I guess his name is Scotch—that when he hears and visualizes the scenes across there where the Scotch Highlanders are fighting this battle for the vindication of American as well as Scotch ideals, that it will so stir his blood that for the moment he will forget this road proposition and putting a road through Malibu Ranch in order to accommodate a dozen or two

3001 people, and will have the larger world vision. When we shall concentrate our efforts and for the moment forget our petty differences at home, and let the Rindge people and the other people who may be called upon to spend money here, put it into other things, Liberty Bonds and Red Cross and War Savings Stamps and the other things that go with it. And I don't believe Mr. Hill spoke with the authority of Mr.
3002 McClellan when he announced before the hearing that Mr. McClellan would remain to the end. I remember a famous Bibical scene when, you remember, the dancing girl danced before Herod when he was drunk, and demanded as the price the head of John the Baptist; that he very much regretted that he had made the promise, but because of his oath he would stand by it. Of course, all history said about him that Herod made the wrong promise, and he would have
3003 been highly honored if he had forgotten the promise that he made and have come to the correct conclusion and refused that request. So we are saying here we ought to forget what was the condition two years ago when this suit was authorized, and since then we have been confronted with this other issue, and we will deal with this question on this one basis, on the basis of our occasion here.

'We will say in conclusion, this will cost a large sum of money, both county and individ-

uals. In the second place, that it will cost a large sum of money, and in the third place no overwhelming public interest demands that now, at this time, before the suit has been heard and before the money has been expended, that we should not proceed, and that the public interest would be best conserved by postponing it until after the war, and that is the basis of our application, and we confidently submit it to the board for action on that basis.

'Mr. John Clifford: An old soldier and myself have 80 acres up there; that is all we have got, but as the gentleman says, there is only a dozen people interested. I suppose there is only a dozen people interested; all the others are boys or women. As this gentleman says, of course we ought to put our money in bonds, but look at the way they have to go around; to raise stuff and take it through the Malibu Ranch. Now, I contend that the money the Rindge estate has spent in fighting this road, as a matter of justice to the people, I say that if they had put that money in thrift stamps or Liberty Bonds and given the right of way through there, as a simple matter of justice—and I believe I am talking to a board of supervisors that are permeated with that idea, and they are asking simply for her to knock down the fences through the Rindge Ranch and let them go through. Isn't that a simple matter? They don't want a

3007 macadam road. I believe in every word this gentleman has said, and I don't want to expend any money to build that road. We simply want the coast road so that we can get our produce out and not go around like going to San Diego to go to San Francisco. Now, gentlemen, I leave it up to you as a simple matter of justice. We don't want to spend a million dollars. I don't know how much it would cost,
3008 but the people need a road, and they can buy thrift stamps and Liberty Bonds if they can get through that ranch. While I was up there last summer there was a man came along; his mules had got into the Rindge Ranch through some fences being down and they would not let him take them out. Finally they let him take them out, but said if they ever caught any more in there he would not get them. It is up to you gentlemen to let the road go through.
3009 Just to knock the fences down and let the people go through as a matter of simple justice.

'Mr. Hamilton: We had better hear the petitioners throughout before proceeding with the other side. Do Mr. Anderson or Mr. Guernsey desire to be heard?

'Mr. Guernsey: Not at this time.

'Mrs. Caster: I have 160 acres on the Decker road, back of Mr. McAl, so I have heard about the Rindge road although I don't have to use it. But it would be very nice for me to get through

3010 the coast side. I went in there last fall and brought some supplies up. I went in there last Monday and had to go through the other way. * * * (could hardly understand.) Another thing, this gentleman told us about the war. Well, if the Rindges would do anything good for the war they would give us the road through there so we could raise stuff and get it out. They would do a good thing for the Govern-
3011 ment. * * * People used to go to Switzerland to see the beautiful scenery. We have it in our country and Mrs. Rindge shuts them out and won't let them have a peep at it. If she had put one of those rocky hills in there I would not say anything; it belongs to her; but the Almighty God has put them there for every one of us to look at and take a peep at. That is all we are trying to do, only to give us a narrow road to come in and look at them. Now, if there was a
3012 new road they would have to come through my land to meet the other road. I have 160 acres; I am willing to give 40 to help them make it for those settlers, although I could get out without that. So there would not be any expense at all. We settlers would fix that up to meet the other road. I am not rich, but I don't class myself poor. I am a widow for the last 18 years. I have raised three children with work in a tailor shop. I took that land for my boy; he is kind of sick. So I think for that I am

3013 nothing against her, but I give all that land for the road so people can get out. I think Mrs. Rindge instead of fighting not to sell the land, ought to give this road and help us raise stuff for the Government.

'Mr. Newby: How many acres have you in cultivation?

'Mrs. Caster: I can't get in to get the grub in. It takes me three days and I eat it up and
3014 I have to go and get some more grub. I can't cultivate it.

'Mr. Newby: Is there any of it capable of cultivation?

'Mrs. Caster: Yes, sir. You could not buy it off me. I value that. I think I could cultivate 80 acres, good fruit land.

'Mr. Newby: You go by the Triunfo road?

'Mrs. Caster: Yes. Before I used to go through Cornell, but I could not get through
3015 there at all.

'Mr. Newby: You have an outlet by the Triunfo road?

'Mrs. Caster: It is not for me. I am willing to give 40 feet of my land and help make it, because it is for the interest of my country and for the interest of the public. That is the way I feel.

'Mr. Newby: Were you born in this country?

'Mrs. Caster: I was born in Chicago.

'Mr. Newby: Chicago is in America, I admit that.

'Mrs. R. L. Mason: During the ten or twelve years or more that the Rindge road fight has been on, the Rindges have introduced every conceivable reason under the sun why this road should not go through. Why at this time of war do they come forth with this sudden burst of patriotism. An opportune time for those with selfish interests to use this means to appeal to the public sympathies and to work on this legal phase that their lawyer has presented to us. I am not a lawyer, and I am simply an unsophisticated woman, but I know justice and right, and it is simply abominable the way they have done through all these years, and it is time something was done, and we are going to see that something is done, and we feel we have enough backing now and enough people of influence interested that they are going to see that we get justice. Now, there is not one of those people—hundreds of people, not, sir, a dozen or half a dozen as you stated a moment ago—but hundreds of people that will be benefited, but not one of those people would ask you gentlemen for one dollar, for one cent, if it was going to rob the United States or our soldiers or our cause in this war. Their attorney has said that if we simply get the right of way through there and don't go and build a highway,

3019 that it will be simply a theoretical road. Was that a theoretical road that I traveled over 12 years ago and that other old settlers traveled for 40 years, as they testified before the Government hearing in this case? No, they were able to get back and forth over it, and they brought their produce down and they were making good livelihoods there and raising families and doing what the Government is urging us to
3020 do today, to go to the soil and produce. That is what we want to do, sir, that is what we have been prevented from doing all these years because we have not had the roads. The discussion as to how many will be served does not need to go into it, because everybody who is familiar with this case at all knows of the vast number that there are located back there through the Malibu country, and the audience here today testifies to that, so I will not go into
3021 it. When it comes to a proposition, however, of benefiting the country, giving help to the Government, I want to say that here a short time ago Governor Stephens brought up before the State Council of Defense the subject of having a road along the entire California coast for a highway in case of emergency, or in case of invasion on the Pacific Coast at any time that the state would be able to protect this coast, and he suggested that a highway be built and a railroad run along parallel with it, that they

might transport the heavy coast artillery. Now, you may say the Pacific Coast will never be invaded. Well, we did not think here some years ago that the United States would ever be embroiled in the war it is at present, and if the United States had been prepared some years ago as they should have been the Kaiser would have had his quietus placed upon him long before this. It may be we will never have an invasion of the Pacific Coast; we hope not; but if there ever should be an invasion of the Pacific Coast, a highway along this entire shore would be invaluable to the Government, and they would give the state a mighty fine "Thank you" for having built it.

'Mr. Newby: Would you be willing to submit that question to the War Department as to whether it would be a military question?

'Mrs. Mason: I am simply stating that as a possibility of what might be. Now, at the present moment we are not asking for that, sir; we are simply asking that that road be opened so that we can have access to the country. We don't care whether they spend a dollar on it. We traveled it for forty years; I have traveled it for twelve years along that coast. We can get along with it as it was before this last controversy. We are willing to take it as it was without any money spent on it.

3025 'Mr. Newby: Would you permit a question? I understand the new survey does not go over the old road except in a very small portion of it.

'Mr. Hill: Practically all of it goes over the old road, so the lady is right.

'Mr. Newby: There is a difference here. Mr. Scotton says just a small part of it is on the old road.

'Mrs. Mason: Questions have been brought up in various discussions by Mrs. Rindge's in-
3026 terests that smuggling has been going on up there. I don't know who she is intimating smuggling has been conducted by, but with the road closed, with no access over there for the Government's officials, or others, there is great possibility that smuggling is going on there, and of course smuggling could only be done by those who have access over that road and through there.

3027 'Mr. Newby: You don't include the lawyers in the smuggling do you?

'Mrs. Mason: That is the natural assumption that one might make. The Government's officials have informed me that their officers have had cases that they should have gone up along that coast and they have been unable to on account of the obstruction in the road. Is it right that you should deny the Government's officers a right to go about their own business?

'Mr. Newby: I think you are mistaken there. Mr. Elliott, the collector of customs, who has control of this, has been not only granted absolute right but has had men sixty days at a time there, he informed me one week ago.

'Mrs. Mason: I have this statement from one of their men.

'Mr. Newby: I know Mr. Elliott and he told me a week ago he had been up there sixty days at a time trying to capture the smugglers, at the special request of Mrs. Rindge.

'Mrs. Mason: We will let it go at that. However, I know sheriffs and various ones have been turned back on a number of occasions in past years. However, there are many others that will have a word to say on this also, so I will simply say that we are not asking that any of the war measures suffer through anything that should be granted us, but we want access to and from that country and a right to pass over that road, whether there is a cent spent upon it or not. That is all we ask.

'Mr. Guernsey: Mrs. Mason how many acres do you own up there?

'Mrs. Mason: Something over 320.

'Mr. Guernsey: Where is it located? A. In sections 17 and 18.

Q. How near this proposed county road? A. Some two miles on a straight line.

3031 'Mr. Newby: Do you live there? A. I have not been able to live there, because I don't intend to go up there and half starve myself. Fortunately I am situated so that I can stay in the city.

'Mr. Guernsey: Is that property under cultivation? A. Not this season.

Q. Was it last season? A. Yes, sir.

Q. How many acres? A. I could not tell
3032 you. Probably about 30 or 40 acres.

'Mr. John H. Mundell: These gentlemen are speaking of the cultivated ground. I think if they get up along the Ventura county line where they have to pack their beans out and pack their groceries in over some of those trails, go up this year and see the crop of beans there,—there will probably be 1000 sacks—and to really pack them on horseback, I think they will be willing to leave that road open until after the
3033 war, if they want to be patriotic. There we have been packing in groceries for three years, * * * let alone backing the beans out.

'Mr. Newby: Do you live in this county?

'Mr. Mundell: I live just across the line.

'Mr. Guernsey: How many acres have you?

'Mr. Mundell: 160. I am farming about 30 acres this year.

Q. How long have you been there? A. Nearly ten years.

3034 Q. How far are you from this proposed county road? A. I live 1-½ miles from this road if it goes to the Ventura line.

Q. I mean the proposed road and over the Decker road. A. Then I will be 6 miles from the Decker road, but I am a mile and a half from the end of the Malibu road at the Ventura county line, and I will say there will be close to 1000 sacks of beans raised there.

3035 'Mr. Newby: Does the proposed condemnation suit extend to the Ventura line?

'Mr. Hill: Yes, it does.

'Mr. Mundell: And I will swear we can't hardly get our groceries in, Mr. Hill knows.

'Mr. H. H. Manley: I have listened to the attorney for the Rindge people, and I want him to know that myself and wife and a few others that are here did not come on account of a letter that we saw in the paper, and on the contrary it
3036 was the interest we have in the development of the property that we own back of the Rindge estate. I spoke here some months ago. I told at that time we have 440 acres of land directly back of the Rindge estate, sections 24 and 5. We cannot get to it in any way, shape or form, excepting through the Rindge property. To go around the other way would take days, and the mountains are so precipitous that it would be impossible for us to carry food or supplies or anything there. When I spoke some months

ago I proposed at that time that the road be put through the land bought from Mrs. Rindge and pay her a respectable price for it, but it did not seem to me from her talk that she wanted to dispose of it at all,—merely an objection to keep the settlers from her property and block development. Now, all of this land I own in there I cannot do a thing with. I don't live there, although I would like to develop it. I have prepared to, and have already arranged some two years ago for a man and his wife to go in there and develop this property for me, and the only thing that has blocked me is the fact that I can't get to the land, and the only way I will ever be able to get to it is through the Rindge estate,—the road I went over when I bought the land, and a road that is quite good enough for anyone to use today without any money spent on it. As I remember the road it was quite passable and good enough, although as the lady said some time ago, I do think, regardless of the expense, that it might be to the country's interest that a road be put through here at this time even and all along the line; it would be one of the best protections that our country could have. The time may come and it may come any day when we need something of that kind. Traveling as I have through the tunnels of the Southern Pacific road, and realizing as I do that one charge of dynamite would

3040 blow one of those tunnels to pieces and block travel for months, a road along the coast would be the only thing that would save the country, and I believe that even though it cost a million, two million or five million, the way money is being spent today for our protection, that it would not be money badly spent.

'Mr. Newby: Don't you think that ought to be left to the War Department as to the military road?

3041 'Mr. Manley: I think the War Department have at the present time quite as much on their hands as they care to assume, and that our local affairs should be handled by those competent of handling them here. The number of settlers I cannot speak for, although I do know that there is in my own family five that would be with me in the development of the 400 or 440 acres that we have, and it is only a small piece of what

3042 lies behind the Rindge property. It does not appear to me that it can be from a patriotic standpoint that the Rindge people refuse, deny those who have spent their money and have tried to develop that property, it don't seem to me it can be from a patriotic standpoint, because the development of the ground behind there will bring more than all the Rindge property together, although they have the choice section; they have the level land, which is much more easily developed and cultivated. Things

3043 can be raised on that mountainous ground. Goats, sheep, cattle, all of which would be looked upon with a great deal of favor by our Government today. The development of that property behind cannot be made until the road is opened, and the sooner the road is opened the better it will be for all concerned, and it certainly will never reflect any discredit on those who have been most instrumental in having it opened.

3044 'Mr. Guernsey: How many acres have you up there? A. 440; representing 40 acres of a friend.

Q. How long have you owned that property? A. Several years.

Q. For what purpose did you buy it? A. Now, I don't know; what do you buy property for?

Q. I thought perhaps you bought it for the reason that you thought some day the county
3045 would build a boulevard to your place. A. I don't know; I have not given that any thought?

Q. Lots of the people have, and you will hear more about that later. A. I have been assessed for a great many roads; have helped put in roads through different properties. This is not the only piece I own.

Q. Is it level? A. I am level.

Q. I am asking you if the country is level up there. A. Down where the Rindge property is.

3046 Q. I have not the least idea about your property, if it is a mountainous country, fit for goats, or level. A. You have probably been up there.

'Mr. John Fitzpatrick: Honorable board of supervisors and ladies and gentleman: If these people—the Rindges—want to talk about being patriotic—I drove in there over a road, and afterward this road was closed up, before the war was declared, and I think their duty
3047 should have been to have throwed the road open at least until the war was closed. We had seven men in there of draft age and five of them have been called, and one man crawled out through the brush, through a trail that he had been written a notice not to travel over, and went to the officials to give himself up. I notice in our papers, ladies and gentlemen, that our men here where they have got a road have
3048 taken their mothers and brothers and sisters with them to the train, with a basket of good fried chicken and one thing another. He could not do it. I am not able to get up here and make as flowery a speech as the Rindge's attorney, because I don't know how, but if you want to talk patriotism, I think a man when he is drafted should at least have the right to drive his horse out to his county officials.

'Mr. Guernsey: Mr. Fitzpatrick, you live in Ventura? A. Yes, sir, a mile and a half, and

my ranch is 80 rods from the Ventura county line, and the only access I have in any way to bring my produce to Santa Monica will have to be down along the coast into Los Angeles county.

'Mr. Hamilton: Any good American citizen is welcome here, whether he is in this county or not.

'Mr. E. B. Parks: Gentlemen, I took up a homestead there, I filed on it a year ago this month; I got in four loads of stuff, merchandise, groceries, etc., before this road was closed. Since I have moved up there I have to go in over a trail and pack about three miles. It has bothered me considerably by not being able to go over the road which I went in on, which I have been going over since 1914. I have always used the coast road, and I the same as all the other settlers in there,—which is a good many—have used that road and have no other way of getting in and out without packing over a trail, and won't have for a good while to come on any other road. If this road was opened at the present time we could use it, the same as we always used it, the same as we got in there first, and I think it would be patriotic of the Rindge Company to open that road at the present time, and if they want to postpone this until after the war is over, they should open up the road and give the public the use of it at

3052 least. But they don't seem to be willing to do that. They just wish to keep the public out and stop the people from using it. I don't see any use of going further with it or allowing them to continue to close that road when it is bothering the public as it is. My place is at the county line; it is divided, partly in Los Angeles county and partly in Ventura county. I am living in Los Angeles county.

3053 'Mr. Guernsey: How many acres do you have? A. 240.

Q. You live at Venice? A. No, sir, I live up there.

Q. How many acres have you in cultivation? A. I have none in cultivation except a garden this year. I was unable to cultivate because I was unable to get my implements in there to cultivate with.

Q. You could get them in from the Ventura
3054 county side? A. No, sir.

'Mrs. O. H. Kapler: Sections 18 and 19, 160 acres. There has been so much said about there being a dozen or so people in there. I would just like to say that in the radius of about six miles, that is, in and around Los Alisos Canyon where we live, we have 17 families actually living there right now, every day, and in that land there is not one piece of Government land to my knowledge that has not been filed on by someone, either under homestead, isolated land,

3055 or the many Governments acts that we may take under. There is not to my knowledge one piece of land left, and we have a Sunday school there with as high as 30 in attendance. We ourselves used to come in, as one gentleman suggested that we now come in, by the coast road. That is all we ask, that we might come in the way we went in originally. We are not asking the county to build a boulevard today, during this
3056 war, and as to patriotism I would like to ask, would it be more patriotic to close up all that land when the Government is telling us to cultivate all land? Back to the soil and raise all we can. Will it be more patriotic to close that up and leave our cattle in there to starve? We can't get them out, and they will starve unless we live there and take care of them. We ourselves lost 10 head. That is small in comparison with what Mrs. Rindge had,—I sup-
3057 pose she lost too,—but she could at least get things to hers, but we could not get stuff to ours because we could not pack it in over the road we have. When we went up the coast we lived 30 miles from town, and now it is 60.

'Mr. Newby: The reason you lost cattle was because of the drought? A. Because we could not go out and buy feed.

Q. Very few people do it. A. We would have if we could have gotten it. We would not have let our cattle die for feed.

3058 Q. How many acres have you in cultivation? A. We have never had our cultivated land surveyed, but it is something in the neighborhood of 20 acres, and we are clearing all the time, and we are living on the land, and there are a great many people who own land in there who would be glad to live on it if they could get to it.

'Mr. Guernsey: Mrs. Kapler, how long have you lived there? A. We filed on the land when
3059 we were just old enough to make our filing, so it is something like 12 years ago. We have lived there according as to whether the Coast road was open or closed, and we could get there or not.

Q. You never have used the Decker road? A. We are using that now. That is the only way we can get out.

Q. What do you call the Decker road? This
3060 proposed survey? This link that would connect the roads? A. About a mile or mile and a half.

Q. And the old road? A. It went right to our door up the coast. That is the road we went in there by and we have always used.

Q. You have 20 acres cultivated? A. Yes, and we have a good deal more that can be cultivated as we are able to do so.

'Mr. Delorey: Can any parties here furnish us with the information how many acres are

3061 under cultivation up there, and how many acres were not put under cultivation on account of this road being closed?

'Mr. Scotton: I might state we had a survey made of acreage under cultivation by those people in the mountains that were attempting to use the Coast road, and the total was a little over 400 acres under cultivation or ever had been under cultivation.

3062 'Mr. Hill: Mr. Scotton, it is a matter of fact, isn't it, that the Rindge interest, either direct or through dummies, has acquired 36 different pieces of property up there, hasn't it?

'Mr. Scotton: Absolutely no, not one identical acre, not one acre.

'Mr. Hill: They have acquired no property back of the original Rindge Ranch.

'Mr. Scotton: You said through dummies. They have purchased property back of the 3063 ranch, in 1901. He never was able to make a living on it. He was very glad to sell it.

'Mr. Hill: Isn't it a fact that the Deckers alone have about 200 acres under cultivation?

'Mr. Decker: We have 80 acres in our bean field, and in our 160 A. homestead we have 12 acres in barley this year. We have 4 acres in corn, 2 acres in potatoes. We have acres of vineyard set out, and that is not all that can be put in but that is all we could put in this year. We could put in nearly 100 acres of our 160 A.

3064 homestead, and the 80 we have in beans that could be nearly doubled.

'Mr. Hill: How many acres? A. I have in the neighborhood of 100 acres in cultivation this year. I could put in about 200 acres or 225.

'Mr. Hill: Mr. Decker, how many acres did you say are capable of cultivation that would be tributary to this road?

3065 'Mr. Decker: In the neighborhood of 1,000 or 1500 acres, maybe 3,000.

'Mr. Scotton: Mr. Hill, I would like to have you explain to the gentleman who has just made the statement, what road you have reference to, the road on the Malibu Ranch along the coast, or the road from Charlie Decker's house over to the (?) property?

'Mr. Hill: I mean the territory that would be accommodated by that Malibu road.

3066 'Mr. Scotton: The old road; that is, from the eastern end of the Malibu Ranch up to the Ventura line, and then across to Little Lake.

'Mr. Hill: Here is the thing this board is interested in. They are wondering how many acres of land that could be put under cultivation that is tributary to this road.

'Mr. Newby: Let me ask you a question. How many acres of level land does the proposed road destroy? I understand 160 acres.

'Mr. Hill: May have been in cultivation once.

'Mr. Guernsey: It is now.

'Mr. McClellan: That is impossible.

'Mr. Scotton: Mr. Hill, will you kindly ask Mr. Charles Decker if it is not a fact that a large percentage of the property he says can be cultivated is already taken care of by the Decker road, that has been constructed by the county from Little Lake up to Charlie Decker's home place at the present time.

'Mr. Hill: Do you know there has been only one stripped Ford ever been able to get over that road?

'Mr. Scotton: I am not talking about automobiles.

'Mr. Hill: But you are talking about roads.

'Mr. Scotton: They want some way to get their produce out. That is what they are talking about? They are not talking about using a Ford, but with horses and teams. Kindly ask Mr. Charlie Decker how many acres can be served by this Decker road, that the county has already improved up to Charlie Decker's place; I will not say all the way.

'Mrs. Decker: It is just one strip, about a mile and a half.

'Mr. Scotton: Improved so that it is more easy.

'Mrs. Decker: I will tell you, I and the girls

3070 went out with the mules and plowed out a place so that we could get a team over it.

'Mr. Scotton: That is not unusual; everybody has to do that, even the Rindge Company.

'Mr. Decker: When we spoke of cultivated land we did not refer to that in our immediate vicinity. It would take in many acres * * *

'Mr. Scotton: Mr. Hill, before you go will you answer my question? Kindly find out from the gentleman, Mr. Charlie Decker, who made
3071 the statement of about 1700 acres of land that could be cultivated that would be served by this Malibu road; I want to know how much of that is served by that portion of the road that runs from Decker's home place northerly to Mather's (?) Lake, and what portion of that would be served by a road from Decker's place down to the ocean and along the Malibu coast.

'Mr. McClellan: Never can be served prop-
3072 erly, any of it in there, without your coast road.

'Mr. Scotton: Mr. Hamilton, a question has been asked by Mr. Hill for the acreage that would be served, in order to give this board some idea of the amount of acreage already under cultivation or could be cultivated if this road would be put through, and the statement has been made, 1700 acres. That is in your minds. Now I think we ought to find out as to whether the whole 1700 acres would be served by this Malibu road, which runs along the coast,

3073 or is already served by the road from Charlie Decker's house northward to the Matthew (?) Lake.

'Mr. Decker: I mean the land that could be farmed from Los Flores Canyon to the end of the ranch, and back of that even.

'——: I will tell you how much a man can farm on an average of his 160 acres. A man don't need to have level ground to farm it. I
3074 am farming pretty steep ground, and a man can farm more than one-third of his 160 acres. The soil is there, good soil, and it don't have to be level, and I can farm more than one-third of mine. Of course I can't drive all over it in an automobile and look at it, like the Rindge estate. And they can all farm from one to two-thirds of it, and I bet Mr. Decker can farm of their 1200 acres, or what they have, can farm one-half of it.

3075 'Mr. Hamilton: How much of this land in question is served or can be served from this other road?

'——: The Decker road? Just a very little. Mr. Decker is here, and Mr. Kepler, and the other Deckers, and the Kincaids get to it, but I have seen them with four horses and they don't get over 600 pounds over it, and if a man can't pull over 500 pounds in and out with four horses, they can do very little farming. I think they ought to have a road they can

haul stuff out on. I have only been staying there steady three years, and it costs money to get stuff in and out. You ask the attorneys there if it is not good soil. If it is not I don't think Mrs. Rindge would keep it. I can farm half of my place.

'Mr. Hamilton: How much will the condition of that property be improved as to getting out if the right of way is acquired and no further expenditure made? How much better off will you be?

'——: I will tell you. Of course, they have dynamited the road and blew it up, probably would have to be repaired, but I have hauled 1000 pounds in there with a single team, and I don't know but I think we could all travel it if it was in as good condition as it was.

'Mr. Delorey: When you bought your land, located up there, there was not a question of this road being closed, was there?

'——: They never stopped me.

'Mr. Delorey: Would you have bought your ranch if you had thought this road would be closed?

'——: No, I would not. I stopped at Mrs. Rindge's house when I was building and they never said anything to me.

'Mr. Newby: This coast road was under injunction from 1905 to a few months ago. Mrs.

3079 Rindge was forbidden by injunction to close the road.

'Mr. Hamilton: We think that was an unjust decision.

'Mr. Scotton: Mr. Hamilton, I doubt if you ever read the record in that case.

'Mr. Hamilton: I read a considerable part of the pamphlet.

'Mrs. Rindge: Mr. Hamilton, may I say a
3080 word? I am the owner of the Malibu Ranch, and these people are living between me and the state highway. There is a natural road which almost all these settlers that are in there could use, from the state highway up through to Decker's, from the Crags Country Club, which is closed up, and none of the supervisors have been brave enough to open it up through there because they might lose a few votes, and that road has been closed up. There was a road that
3081 led out a lot of these settlers. Then the Deckers went in, and Mr. Rindge bought out all those persons except Mr. Decker. Mr. Rindge paid them too much, that is why they are there again. Then they go and get another piece. Then Mr. Rindge when he was $7500 Mr. Decker was at $10,000; and Mr. Rindge $10,000, Mr. Decker $12,500. When Mr. Rindge got to $12,500, Mr. Decker was up to $17,500, and that was where it ended. Now if Mr. Rindge had bought out the Deckers and left all the other people there

3082 he would have been better off today, because the other people were not against me all the time. They were simply against the Harris people. * * * Now these people are going up there with the purpose of holding us up. One man up there was a saloon man. He would take saloon men up there. He would hold us up for $5,000. Mr. Rindge would not pay it. Finally one man got delirium tremens and finally he dropped dead. Mr. Rindge then bought him
3083 out. Then Mr. Rindge went and bought a man out by the name of Leeds in Malibu Canyon. Then my husband died. We would not let him in there; he finally got in there; then he fell out in his head, then I bought his estate to get him out. We have been held up all along the line by those peopie in there charging us big prices, coming down on our land, living off us, taking our beans, hay and cattle. Just a short
3084 time ago 250 head of our cattle went from the April rodeo to the September rodeo. Our pigs go off 40 at a time, 200 at a time, just disappear, nobody knows where they go. We caught one man stopping one and cutting his throat, in Ramirez Canyon. We had him arrested for that, and the justice of the peace said the pig must have committed sucide, and we never got anything. Now, we have dealt with those people all along the line like that. When that injunction was brought they were not con-

3085 tent with the injunction, they wanted to put me in jail,—Mr. Haas and Mr. Duncan—under the fencing act, because we put fencing there to keep our stock from getting out and their stock out. They had the Federal Government someway,—I could not tell you just how,—then they were going to put me in jail for putting fences there. Then they brought an injunction making me throw open my gates. The amount of stuff they took, why, it has kept all those people;
3086 they don't have any visible means of support. Now they don't live there; only about ten people live in those mountains. Most of them live in Santa Monica. Mrs. Kepler lived in Santa Monica until about the last year. When we closed the gates they went in, only occasionally they would drive up there. Kincaids never lived up there only a short time. They have about 200 acres. Carl Haas has about 80 acres. Why
3087 should we give roads to these people when they live between us and the state highway? There is a natural way. I think Mr. Hill has property up there,—

'Mr. Hill: I have not even a hill up there.

'Mrs. Rindge: There was a great big boat coming along, we were sitting on the beach, there was a big boat and it was loaded with logs or rocks. When it got in front of —— Canyon we thought it was a big barge loaded down very low to the ground. We looked at

3088 it and we said, "It is a well-shaped boat"; it anchored in front of —— Canyon; it saw us and they drifted on. It was the day of the earthquake,—and went up around the point. I had a lady friend with me and we went around the point there and we saw a big boat coming this way. I said, "there is a big boat pretty close in." We paid no attention to it; we went to our machines on the bluff, then we had them
3089 put under the trees. Very soon this boat put out to sea, and it flashed nine times, and we said, "that's strange," I said "smugglers," and they said they guessed it was smugglers. It went around and came back right close in front of —— Canyon. Pretty soon we were ready to go home, and it blew two blasts. * * * Now, that, I am sure, was full of ammunition, to be loaded onto that boat. My lady friend says, "Let's report that." I said, "No, I have
3090 reported it hundreds of times and nothing ever comes of it." And she said, "I am going to report it," and she finally did, and a man said he was going to report it to the bureau of information, but it never was reported. Now that is very strange. I don't know what it can be. About the smuggling on the ranch, there is not half the smuggling that we used to have. All of it goes on at night. Our men don't allow them on the ranch. We have so much stealing; only last week a sack of seed beans

3091 was stolen from the field. I told him when he went up there our beans would be taken right off the field. Those settlers don't have any visible means of support; they have to live somewhere. Now that is the thing we have been under. Is there any man in this audience that would stand for a thing like that? Is there any man here that would allow their products to be rustled and taken off, and all that stuff to be
3092 utilized by people too lazy to work; they go up there to load, people that are just too lazy to work. If they wanted to work they could build roads to these other roads.

'Mrs. Mason: Mr. Chairman, may I answer a few of those points? All over Southern California there are enormous ranches, some of them comprising many thousands of acres,—more than the Rindge Rancho—and I don't think it has come before our county officials' attention
3093 that there have been so many depredations committed upon these other ranches. I don't recall one ranch that ever reported and there has been published in the papers the cattle poisoned and the grain stolen at the Rindge Ranch. Why is it the Rindge Ranch is so particularly afflicted in this matter? I think if they give a little introspection they might get some light on these things. Everyone loses more or less on a ranch, one way or another. Fires have been set that very frequently get out of bounds and unable

3094 to be controlled and more ranches than the Rindge Ranch have suffered in that way. As far as the cattle being poisoned is concerned, some time last summer The Times published quite an incendiary article, that sheep had been poisoned, and if I am not mistaken it was frankly mentioned that the settlers were poisoning the sheep on the Rindge Ranch. The county officials took that up and sent out the veterinarian to make an investigation and his report
3095 was that the cattle had died from anthrax. I suppose the ranchers went down there and inoculated them with anthrax.

'Mrs. Rindge: They certainly did.

'Mrs. Mason: So far as these boats out to sea with their suspicious actions, as I said before, these ranchers having no access over your ranch, gates being erected and guards placed, they have no means of doing any of this smug-
3096 gling or crooked work that is insinuated, so someone on your ranch must be responsible.

'Mrs. Rindge: They come from the hills.

'Mrs. Mason: All the more reason why this road should be opened and access given to anybody and everybody, and it would do away with that. Give the officials an opportunity to go back and forth up there. Years ago the Government wanted to erect a lighthouse on that point, and Mr. Rindge demanded of the Government a sum exceeding the purchase price of the ranch,

3097 and the Government was unable to put the lighthouse there for that reason. Is that patriotism?

'Mrs. Rindge: I say it is a lie.

'Mr. Guernsey: That is not a material thing at this time.

'Mr. Hamilton: I think these personal allusions probably do not help any in reaching the conclusion.

'Mrs. Mason: Probably not, Mr. Chairman;
3098 I apologize. However, it was the accusation of persons poisoning the sheep, which was enough to arouse—

'Mr. Guernsey: That was blamed on the Germans.

'Mr. Newby: We are not charging the settlers with any depredations at all.

'Mr. Anderson: It is unfortunate, of course, that personalities should be injected in this matter. That ought to be omitted absolutely.
3099 I know that this board is desirous of doing what is right in this matter, and you have sought to ascertain data upon which to base your judgment. I am not here to undertake to say how much tillable land there is in these mountains back of the Malibu Ranch. I have been all over them, but I do not know the statements that have been made here are gross exaggeration, and it seems to me that if this board does intend to pass upon this matter intelligently, that you should get more definite information through

3100 your own means or means at your disposal as to these pertinent questions that you have asked here, which tend to throw light upon the importance of this road as a war measure. Now, the main case in which most of them are interested, that is, the longer road, is not set for trial yet. The cross road from the beach to —— is set for trial, but the road which would have to be provided and built in order to use this other
3101 road is not even set for trial yet. Therefore I am satisfied that neither the interest of these people back of the ranch would suffer nor anywhere else if this board would take the time which is necessary to inform themselves as to the amount of land which is under cultivation or which can be cultivated within a reasonable time in these mountains back of the ranch. I would suggest before you act in this matter that you inform yourselves by sending out men
3102 who are qualified to pass upon it and look into the matter. Then I am satisfied that you will find that matters have been greatly exaggerated. As a matter of fact the main road along the ocean will not give access to any of this mountain land except that which is tapped by the existing Decker road and the new one proposed to be built. For 16 miles there through the ranch there is no connecting road. You have to go through the ranch to get to the mountains behind it. This district in which the so-called

3103 Decker property is situated is already fed by an imperfect road, it is true, from the north, but which could be improved if even a one-hundredth part of the money that has been spent in this useless litigation had been used for that purpose. So I suggest that this board, before passing upon this inform itself, not from *ex-parte* statements from myself, from settlers or from Mrs. Rindge or any one else, but on this
3104 important matter which is material to this question, which is, is this road of such importance as a war measure that it should be built now? Mr. Hamilton stated that the decisions in the three or four cases which have been tried were unjust decisions. I think you should not have made that statement, because I am satisfied you cannot have read anything like the record in those cases, because they occupy a great many thousands of pages, and the little pamphlet
3105 which Mr. Dodge handed up is an *ex-parte* statement gotten out by the man interested on the other side, and does not contain the truth of all cases.

'Mr. Hamilton: The book I alluded to was, I am quite sure, distributed by the Rindge interests.

'Mr. Anderson: We will say, then, it is the decision of the judges, but that decision was based upon the evidence in the case. Can anyone pass upon that unless he has read the evi-

dence? One case was tried before Judge Bean, who sat in the Federal Court in the Northern District, and after months of testimony was taken and four weeks of argument he held that the settlers in there could build roads easily to the north, and they were not entitled to a road across the ranch as of necessity. The main case which was brought by this county and which went to the Supreme Court of this state was reversed, not on questions of law, but because the seven judges who heard that case and read the testimony decided that the evidence did not show that there was ever any public road there. Neither Mr. Hamilton nor anyone else, until he has read the testimony should say those decisions are unjust.

'Mr. Hill: Mr. Chairman, counsel has gone to some length and taken up the matter of the letter that I wrote to the Chamber of Commerce. I might state, gentlemen, that that is the way we do things here. We do them right open and above board. We are glad to have the public look at them. We don't have to hire anyone to circulate any petitions to put in for us. It is really a refreshing circumstance to see the Rindge interests come before this board of supervisors with the Stars and Stripes wrapped about them, in which they enthuse with patriotism. It is a remarkable lapse of memory that that did not occur during the time a military

road was desired up there, at the time that the state of California wished to get a paved road; and as the lady very aptly said, neither did that occur at the time the United States Government wanted a lighthouse on the Rindge Ranch. This is a sort of latent patriotism that has just come to life. The fact of the case is that patriotism is the vehicle on which they are trying to ride to selfish motives. Speaking of conservation of property and moneys, certainly we should conserve. I subscribe to everything my friend Mr. Newby says. Every one of us must do this. We must all get in and help the war, but I want to tell you, the amount of money to get a right of way in there, to put a road in to allow these products to come out, will in one year's time more than pay for the money that will be spent, and those products can be used for this Government in a patriotic manner and we will have a road up that coast. Now my friend Mr. Newby referred to the consideration of the Capital Issues Committee. I think through a misstatement he referred to an Act of Congress. There is not any Act of Congress on that matter. It is simply a commission that was appointed in Washington. We have been through that matter here in the flood control matter, and they don't touch on any matters less than $100,000. Mr. Sartori called me up half

an hour ago. I suppose you have been to see him to have him working on this matter.

'Mr. Newby: I did not.

'Mr. Hill: Some one had evidently seen him because he called me up, and I explained to him what the situation was. Now, you refer to Mr. McClellan being with us on this thing. Mr. McClellan has been with the people on this thing without any question. He wants to do what the people want, and as far as I am concerned on this thing, I want to do what the people want up there. Counsel referred—and it was really an amusing thing—to a Biblical figure of speech in which Mr. McClellan was likened to a Salome. That might be good, but I can't conceive of the Rindge interests occuying a like position as John Baptist. Now, Mr. Anderson referred to the matter of the case not being set for trial. It is a fact, and you will agree with me, we have given you time on that and your office has promised to have an answer in for several weeks.

'Mr. Anderson: I only referred to that as a reason why this board could take the time.

'Mr. Hill: I might state that they have done that. Mr. McClellan has been over that place. Now, only a word more. A great deal has been said about patriotism, about our country, and about the cruel war over there. I look at this thing that every man who owns property—I be-

lieve in the right of property, but I believe in that right of property first to the extent of taking care of your family, and when an all-wise Providence has been kind enough to you to give you more than you need, you hold it in trust for the benefit of humanity, and this war is being fought right along the lines that there will be no longer an imperial imperium in any community. The rights of all humanity are disregarded in the Central Empires. I don't know of any rights that are regarded on the Rindge Ranch. And so far as I am concerned in this matter, these people behind the Rindge Ranch who are trying to make a living—I have been up there, they are not lazy; they don't live, as Mrs. Rindge says, they exist, and the reason they don't live instead of exist is because they can't get in through the Rindge Ranch, and I for one want to do everything I can to open up that country, to make it a decent place to live in.

'Mr. F. L. Haskell: I want to say a word. I am simply a man that is poor, I am not to be compared with Mrs. Rindge and the rest of them, but I am an American citizen. I have got a son that has gone to fight for patriotism that you folks are trying to bring up here. I did not try to get him out because he was married, or get exemption for him on any grounds. And I think if the supervisors want to see how many acres of land up there are

under cultivation ought also to consider how many acres of grazing land there is. I went up to that ranch, the first time I ever went up there was 12 years ago. I had no trouble in getting over the road. Only, since, some parts of the beach were washed out. When I moved up there I had a four-horse load of furniture, and I got up to within a quarter of a mile of my camp, and I had to take the beach because there was a piece of road washed out, but there was Mrs. Rindge's road open, and I was refused to go over it with my team. I got stuck in the sand. There was 27 heads of mules standing within 300 yards of me, with the harness on and eating hay. I went to Fred Rindge himself and asked for a team or two to move me three or four hundred feet on to the beach. No, sir, nothing doing. "I am sorry for you," he says, "I would like to do it myself, but it is against mother's wishes." As I say, I am an American citizen, and there is land open to entry in the United States which every American citizen has a right to take out. I have tried every way possible to be peaceable up there and cause no trouble at all. Now there has been this brought up about killing stock and all this and that. In all the times that my folkes and I have been up there I have never seen anything of the kind. The only thing I ever saw done was when my son went to one of the riders and

3121 says, "There is a calf laying up in the canyon that has just died." He took the Rindge rider up there and showed him the calf. He went straight to the Rindge people. I had ten head of cows when I started up there and I raised some twelve or more calves. I had to get rid of the whole outfit because you don't try to fix any fence. Yes, mine get down on your place, I will admit, but to one of my cattle getting
3122 down on your ranch, there are 110 of yours get on mine. I have the Rindge riders to prove that.

'Mr. Guernsey: How many acres have you? 'A. 160.

'Q. How many under cultivation? 'A. Not over five.

'Q. How long have you lived there? 'A. Three years.

'Q. How much is possible to cultivate? 'A.
3123 I really don't know; I suppose I could cultivate nearly half of it.

'Mr. Guernsey: Just a word, Mr. Chairman. We have heard a great deal of dying calf stuff here today, sob stories about it, and we have heard about the Kaiser of Germany and about the Imperial Kaiserin up on the Rindge Ranch, but you have a case before you submitted by two sides, and there are two sides to this story. I see Mrs. Rindge's side very clearly and I see the other, and for one moment I will take you up

3124 to the Cornell district where there are many settlers. They live there; they have a pretty little school house. They want a means of ingress and egress. They want a road. If you build this road for six people, four of them living in Ventura county, two of them in Los Angeles county, with a total cultivation of 205 acres; if you want to spend a quarter million on a road of that character at this time, then I
3125 leave it to the board of supervisors to do it at your peril so far as the voters of this county are concerned. I don't think that you will do it. It sounds fine; it is high sounding, to have four or five splendid Americans come in here, and I take off my hat to these fine settlers, and I take off my hat to Mrs. Rindge, not because she has more cattle than they have, I know her troubles and her responsibilities and her cares and her depredations; and Mr. McClellan when
3126 he ran for supervisor, I understand he made a pledge to put that road through—

'Mr. McClellan: Mr. Guernsey, who did you understand that from?

'Mr. Guernsey: I understand it from several.

'Mr. McClellan: It is a lie.

'Mr. Guernsey: That was merely an understanding; I said that was my understanding.

'Mr. McClellan: You be sure of your information.

'Mr. Guernsey: No insinuations were in-

3127 tended. I understand from Mr. Hill's letter that you are with them to the finish.

'Mr. McClellan: Yes, and I am.

'Mr. Guernsey: And Mr. Hill, the county counsel of this county, writing letters to the Chamber of Commerce and similar organizations asking them to send large representations to this meeting. What for? Do they own land up there? I have not heard a word from the
3128 president of the Santa Monica Chamber of Commerce. Why does not Mr. Charles E. Haas, a friend of mine, by the way, who prosecuted this case for months in the county counsel's office, who owns 80 acres and who will be greatly benefited by the road? I say it in the most kind fashion. What about Mr. Manley? Not even a goat.

'Mr. Manley: I can't get one in there, that is the reason.

3129 'Mr. Guernsey: There are all sorts of poor people in this county today living in ravines and canyons that haven't a boulevard. Take a man like Fremlin, ranchers who are developing their property up there and live there. They want a road, too. No one has mentioned their name. Why not build a road for them? If you want a direct route from Ventura to Santa Monica, we will give you a route without one cent.

'Mr. McClellan: Yes, how much will it cost to build it?

3130 'Mr. Guernsey: It will cost a whole lot less than the other.

'Mr. McClellan: I have been thoroughly over it and I know what I am talking about.

'Mr. Guernsey: I have; I will ask the rest of the board if they have.

'Mr. Dodge: I have not. Why isn't there some one here to plead for the Cornell district?

'Mr. Hill: Why didn't the attorney come whom you asked to come?

3131 'Mr. Guernsey: I never did.

'Mr. Hill: Some one asked that they be represented here by an attorney.

'Mr. Scotten: I can say in answer to that that no representative from the Rindge people has asked any attorney to come here.

'Mr. Hill: Who asked Mr. Allen to come up here and assist the Rindges?

Mr. Scotten: I don't know.

3132 Mr. Newby: You have inside information, it seems.

'Mr. Guernsey: I would like to hear from Mr. Middlecoff, one of the Santa Monica Chamber of Commerce, who owns property up there. He does not live there; settled there for business purposes only. Now, there is a profiteering side of this case too. You must look at that. There are men up there, county officials and others, who hold property in that district, and why did they go there?

3133 'Mr. Hill: What county official owns property up there?

'Mr. Guernsey: Sheriff Cline owns property up there. In regard to Mr. Haas, I don't want to speak unkindly, but it was unwise for the county counsel, in my opinion, to place a man in charge of the prosecution of this case, a man who owned property on that road. I say that in the kindliest spirit to Mr. Haas.

3134 'Mr. Haas: Mr. Chairman, I want to state in reply to Mr. Guernsey that I have a half interest in 80 acres in that country that I acquired long before I went to work for this county; that I am not in charge of the Malibu Road Case; that I did go to work and draw up that complaint as a deputy in the county counsel's office. That is as far as I have been connected with the Malibu Road Case. Now, if that is any sin I will leave it to my Creator.

3135 'Mr. Guernsey: Gentlemen, in conclusion I will say this, that I want you to understand that Mrs. Rindge feels, and has a heart, the same as any of the board of supervisors, the same as Mr. Fitzpatrick. She is a good woman, a fine woman. She has her faults the same as we all have, and I am not here pleading for her at all, but I am pleading for the ranchers in the Cornell district. Those settlers are just as wholesome and splendid and patriotic as the four or five settlers we have had along the

3136 Malibu coast, and I will leave it to you gentlemen to find out the men that will be most benefited by the road; whether the Triunfo road, 17½ miles shorter, a wonderful scenic highway through a most densely populated district, serving four or five, twenty-five times as many people living there on their ranches; why not think of them just as much and as well as the few up here in Ventura county?

3137 'Mr. Nettleship: I am here representing the Chamber of Commerce. I would have spoken before, but things proceeded so rapidly it was impossible. The hand is at last shown. Mr. Guernsey here started out—or, rather, his associate, saying it was a war measure, but finally he forgot the point they were making and he says, why not give the Cornell people a road? You see it is out. The Rindge people don't want a road through their place; they don't care

3138 if the county builds a road, so long as it is not through the Malibu Ranch. He speaks about profiteers. What a wonderful thing patriotism is. It helps the profiteer in food supplies, it * * *; and helps people close up their property that don't want people to go through. In regard to the attempt to compromise Mr. McClellan, that is ridiculous. What does the attorney think we voted for Mr. McClellan for unless it was to do what we wanted? That is what every supervisor is elected for. Of course

3139 he will do what we want, because that is what every supervisor wants, the best for the whole country. That is why we put this thing through. The plaintiff's attorney says this is a quasi-court affair, and he had no right to state his opinion. It is a court inasmuch as we are sitting here in * * * but they had decided to put this road through; they had definitely stated which side they were on. And so far as putting this in a
3140 letter, that has nothing to do with it at all. They ask us to set it aside because it is not a war measure. That is good now. If we do set it aside, when the war is over and peace comes they will say, Oh, fighting is over, let's put it down because it is a peace measure. They state it is not a military necessity. There are a lot of things if we had done them from a military necessity standpoint we would be better off than we are today. If the German fleet should get
3141 out here, if there was any place on the coast they would choose to land it would be the Malibu Ranch, because they would be at home there. It is a wonderful thing to me that the ranchers up there have stood it as long as they have. If I had had to undergo half the hardships—children going without medicine, packing all they have for miles, working for years and finally having to give up the place because of some selfish interest on the part of one person. It is a wonder to me some of the people are alive.

3142 Mr. Guernsey stated here he would challange you supervisors to do it at your peril. What he insinuated was public opinion. I don't know but you would be doing it at your physical peril, with the work that has gone on. I think you might, if you do put this thing through, be in danger of your own lives. The Government is asking for every inch of ground to be cultivated and to be used to its best advantage. I am a four-minute man, and we devote a week to plant-
3143 ing war gardens. There are 15,000 four-minute men and we are asked to give a week's time. The Government thinks it of sufficient importance to cultivate the back lots; isn't several thousand acres of sufficient importance to set aside one selfish person's interest? We ask you gentlemen to do it now.

'Mr. Newby: Mr. Chairman, just a word in conclusion, from the side of the petitioner, and
3144 I want to compliment Mr. Nettleship for his very able presentation of the other side. I knew he was a four-minute man, and we are all in the same class so far as the organization is concerned; our method of presentation is different. As to military necessity, I submit that neither Mr. Hill, Mr. Nettleship nor Mr. Newby nor Mr. Guernsey are competent to pass on that question. I give you this challange; if it is a military necessity I am willing to submit it to the military department of the Government to

3145 pass on it. So much for that. I can say if the War Department will say this road is a military necessity, there will be no further difficulty from the Rindge interests with reference to building this road. Let's put it up to them. They are qualified to speak on that question. I am not much of a military man, certainly no Napoleon, but it is inconceivable to me that that road, built in that place, would be any kind of a military necessity, but if it is and the War
3146 Department says so, we are willing to accept this conclusion. Mr. Nettleship suggests that after the war is over then we will object because it is a time of peace. Sufficient for the day is the evil thereof. When we get to that bridge it is time to cross it. He has no right to assume we are not in good faith in presenting this question. Because we call the attention of this board to a matter that has been in the public
3147 press to such an extent that public officials have said that they will not undertake any of these improvements without consulting the Federal Government, then you cannot say with any degree of good faith that we are not exercising our rights in calling it to the attention of this board in this manner before you spend any money. If we have any legitimate argument in time of peace, then I dare say that will be presented to a different court, because if the board of supervisors are then of the same mind it

3148 will doubtl[illegible] have to go to the courts to be ultimately decided. Now, with reference to the Malibu Ranch, the Germans being at home there, that is simply an oratorical flush, and I want to compliment Mr. Nettleship for the very —ability of making a point without any foundation. He has not yet been able to show that the Rindge interests are in communication with the Kaiser, or in sympathy with his autocratic rule.

3149 The court has vindicated Mrs. Rindge after weeks of testimony and after thousands of dollars had been expended, and notwithstanding the decision of the lower court to the effect that certain portions of the road was a public road, yet the higher court * * * reversed it on the ground that there was no conflict in the evidence. Therefore you as a legislative department of the state of California must assume that the highest court in the state must have

3150 known something about what they were doing when they passed upon that question and decided she was right. In other words, it is easy to have the Bolsheviki spirit that is ruling Russia now. * * * I say, believing as I do in the rights of individuals, that it is carrying that principle to a ridiculous extent, and our democratic principles mean the greatest good to the greatest number; this does not require that at this particular time the road should be built even though there were 100 persons up there who

might be deprived of access to a market, if in order to do that it would require the expenditure of more money than all the crops would amount to. Now, in conclusion, Santa Monica, —talk about selfish interests and profiteering; is it purely altruistic that our friends from Santa Monica are here? In the first place, the organization of the chamber of commerce was for the purpose of development along commercial lines, no altruistic motive at the back of it. There is no criticism on them for that, but the very fundamental, bed-rock principle of the chamber of commerce is for the development of commerce, and the chamber of commerce is here because they believe that by opening this road it will possibly add to the welfare of Santa Monica from a commercial standpoint. I have no objection to that, but certainly they can't say that there is anything but a selfish motive at the back of their opposition. So even assuming Santa Monica is on the same basis as the Rindges, and that the Rindges for purely selfish motives are asking you to abandon these proceedings until after the war, then we are on the same basis as the chamber of commerce of Santa Monica, for surely they will not suggest to this board there is any altruistic motive at the back of their presence here today. Now, of course, as to the question of grades and all that, I am not going into it. I went over that

road, and I tell you that it is a difficult engineering proposition, and I am informed that the grade of the Decker road will be even steeper than the Mt. Wilson road, and if you make it possible to do what these gentlemen and ladies, for whom I have the most profound respect, want to do, make it possible for them to carry their material and supplies in and their products out, if they are going to do that it will require money to do it, for a great portion of the time we had to walk, and even the good riders had some difficulty in staying on horseback in going over a portion of that road. Now, a theoretical road, a mere right of way, won't help that situation a bit. It will require real dollars, cold dollars, in order to build that road. In conclusion I want to say I regret there have been any personalities indulged in here today. There is an absolutely true principle involved here and let's forget for a moment the personalities that have been indulged in. I am assuming from the mere fact of the filing of this petition that we are going to have what we are here for, a fair and impartial decision upon the situation as it is now presented, and not as it was two years ago. My reference to the letter of my friend here was simply accounting for the large number here today, and no reflection of Mr. McClellan, as I indicated in my opening remarks, and by the mere fact of our being here

3157 and so earnestly presenting the matter, we are here in good faith. You have legislative discretion which you have a right to exercise in the light of the changed situation as it now appears. Assuming for the purpose of argument that you are thoroughly convinced that in peace time this road ought to go through for the benefit of these persons, for whom I have a great deal of sympathy from their moving tales told here if
3158 we did not know something about all the facts, I say leave that aside, because in war time the things we do in peace time are not considered. * * * Therefore I say that anybody that approaches this discussion from the standpoint of what is proper in peace time has missed the whole program, and nothing presented here today has shown there is any justification for this board going against the established policy of the Government that all our forces should
3159 be mobilized in order to win the war, and when peace time shall come,—and God grant it may be soon,—then we will meet this proposition on the law and not talk about patriotism. I know it is possible to say we are trying to accomplish a selfish purpose under the guise of patriotism, but I say we would be unpatriotic if before you took the step of spending a million dollars we did not call your attention to the fact. * * * And, gentlemen, let me say, don't forget the whole proposition, the greatest good to the

3160 greatest number. Here are a number who have personal interests. Say that we have personal interest, put us on the same place; they are seeking their selfish interests, we are seeking our selfish interest; put us on the same basis, but remember that before these two contending selfish forces there are a million of our people in Los Angeles county and 110 million people in the United States of America who have rights
3161 here, and there is a principle involved that affects them all, because if the board of supervisors of Los Angeles county will grant this one, the board of supervisors of San Francisco will grant another, Wisconsin another, and New York another, and in the aggregate billions of dollars will be expended and turned into private channels that ought to be turned into channels to beat the Kaiser.

'——: Gentlemen, just a second. My wife
3162 was post-mistress at Yerba Buena district and she got letters from the Government. I have not those letters, but if necessary we could probably produce them to boost for the coast road. I believe we could get those letters. There was a boy next to us got his hand shot off. They had to carry him on horseback to get medicine and the doctor. That is a fact; I can prove it, and I believe we can produce those letters if it is necessary from the Government.

'Mayor Berkeley: I did not come intending to make a speech, but Mr. McLucas, our attorney, is here.

'Mr. McLucas: I have not had anything to say heretofore this afternoon, not because I did not have a cause to speak for, but because there was a greater cause being presented here to this board. I can't make a speech as forcibly and eloquent on this subject as any one of these men and women and settlers made here this afternoon. They can plead their cause more eloquently than anyone else, but I do come here today to represent the citizens of Santa Monica and the chamber of commerce and city council, commissioners of Santa Monica, and come here, not at the request of Mr. Hill, not at the instigation of any county officials. I come here because the citizens of Santa Monica have been watching this contest for a road for years and because they expect their accredited representatives to come here and speak for that road, and I myself wrote a letter to Mr. Hill three or four months ago inquiring as to the progress of this condemnation suit. I wrote at the request of citizens of Santa Monica, so this is not a sentiment worked up in Santa Monica by Mr. Hill or by any county official, but it is a sentiment that comes from the hearts of all the people of that community. Now, this is not a narrow question; it is not a question that confines itself

to the interest of those few persons, however important that might be; it is a question that concerns every citizen of Ocean Park, Venice, Sawtelle, all the bay cities and I believe of the state of California itself. This question of a road along the coast is a question that has long been debated. It is a road that is needed by all the people of this county and of this state. Why, the very town of Santa Monica itself was built with a road all up and down that coast, and we thought then we had the road, and people went into that community and settled there. We did not know we were bound around by a chain of mountains, without any road through there. We thought we had a road on the coast, but finally the courts decided there was no road. Now we find ourselves confronted with that situation. Santa Monica Bay surrounded on all sides by a chain of mountains. There is no means of ingress or egress from the north or the south. If a community ever needed roads, if a community ever was entitled to come before this body and ask for additional roads to the north and the south, it certainly is Santa Monica Bay. From every standpoint, from the interest of the people of that community, of Los Angeles county, from a military necessity, a road is necessary from Long Beach, through Redondo and along Santa Monica up through the Malibu and on to the north toward Santa Barbara.

3169 Now mention has been made here of the fact today that people hold property under a sacred trust. I am not here today to criticise anybody. I am not here to criticise anybody's attitude toward patriotism. I believe in patriotism; so do you. But the Rindge people are opposed to a road; they have been opposed to it for twenty-five years. They have been fighting; they will continue to fight it. Why don't they go into
3170 the courts and fight it and win or lose instead of coming here today. It is not necessary for anybody here to base it on patriotism. Every individual holds property on trust, and no individual has the right to shut out any community from roads to the north and south. The people of Santa Monica Bay have a right to a road along the coast and to the north. I have lived in the West all my life. I have seen roads opened up through large estates. I have seen these big
3171 ranches and I have seen it necessary to open roads through them. Of course, they could come in on any large ranch and say there are only two or three people that need this road. That is true until you open up the road. When we put a road through the Rindge Ranch and open those mountains you will see that country developed; you will see the Rindge estate itself developed farther than it ever has been, and I verily believe that with the opening of that road and the development of that country that

3172 everybody, including the Rindges, will be benefited, and I want to press upon this board today the fact that this is not an appeal that is made here alone by these settlers, however important their interest is, but it is an appeal made by all the people of Santa Monica Bay. They are all looking to your action here today. They expect you to represent them and the wishes of the people, to do the greatest good to the greatest
3173 number, and open this road. Give these people access through there, and you and I and all of us know that the amount of money that you spend on that road during this war will have no effect one way or the other upon the war. Let us build the good roads, let us keep up the necessary things; let us fight together to win the war.

'Mr. Chas. E. Haas: I have just a few words to say, and I don't intend to go off into floods
3174 of oratory, but I am going to ask Mrs. Rindge whether after hearing all these talks this afternoon, she does not feel that she wants to deed to the county this road for patriotic purposes.

'Mrs. Rindge: That is ridiculous.

'Mr. Haas: If not, there is one more thing I want to say, Mr. Chairman. There seems to be some mis-judgment, some light that has not been thrown upon these Supreme Court decisions. I have gone over volumes and volumes of transcript in these cases, and I saw not one

word from the Supreme Court in regard to the necessity of the Malibu road. They were not called upon to decide upon the necessity of the Malibu road. They were called upon to decide whether or not under the laws of the state of California, the Malibu road had ever been properly dedicated, and they decided it had not. This board is called upon to decide the necessity of the Malibu road; that is the only question before the board. So many statements have been made about the few persons in the Malibu Mountains. I know the Malibu Mountains from beginning to end; they are a part of my life and my heart, and I want to say there is not a more beautiful section of country in the United States than the Malibu Mountains. I was up there these last few weeks and saw the hardship those people were enduring. I saw women behind the plow because their husbands and sons had gone to aid their country. I saw beside the road that could not be carried by wagon any further. I saw places where the wagons had gone over the bank because the roads were not sufficient to carry them. Now, these things should not be tolerated by the people of Los Angeles county. These people should be given an access to these homes. They are a part of your constituency, and it is your duty to see that they are accommodated by a competent road. I want to say there is only one question before

3178 this board of supervisors and that is the question of the present necessity, and I will leave it to this board if they go through those mountains and see those homesteads and those people working under hardship, as to whether or not the Malibu road is not a great necessity.

'Mr. Miller: Mr. Chairman, a year ago this June I appeared before this board for the first time in reference to this road. I appeared before this board when it was not acquainted with
3179 the facts. At that time we listened to the people, as many here then as now, and the hardships that were related then, the facts that were brought home to the knowledge of this board, I want to tell you shocked me, and it shocked Mr. McClellan, because at that time the honorable member of the board did not believe the facts were as they were. I own a little property between the Malibu Ranch and the Graham
3180 (?) Ranch. Two years ago Mr. Elliott, of Oxnard, and one of the supervisors came into my office and said, "What about a right of way over that road?" I said, gentlemen, name your place; here is a right of way to it, and I put it in writing and handed it to him. That is for two miles and a half, and I own every inch of the property between the Rindge Ranch and the Graham (?) Ranch. I simply will give them a right of way, and more than that, if that property is worth anything, in addition to it—Some

3181 men wanted to farm it. I said all right, gentlemen, I pay for the grain to put in there. They raised there in two years 196 sacks of beans. They had to carry them on horseback 80 miles to ——. They had no way to haul them out. When they planted them there was a road over the Rindge Ranch. Now it is impossible, gentlemen, to get to that country in any other way except up the coast. Now they speak about the
3182 number of people there. After this hearing last year I said to Mr. McClellan, "I don't know anything about that situation except what I hear, but if what those people tell me up there is true, I am going to dedicate a portion of my life to those people. I don't want a dollar's worth of pay from those people, but I said I am going to travel through that country and see for myself." I traveled up the coast; I came in through Sycamore Canyon, over the
3183 Broom Ranch. I came down over that country, and I walked it. There is no other way. Then I went up to Decker's place and stayed all night, and they got their settlers together and there was 65 people there. Then you go in a little further and there is two school districts. You go a little further and you have the Sycamore settlement. You have three settlements, gentlemen. There is no question about the number of people there. All you have to do is to go there. I said to Mr. McClellan, you have not

3184 seen all of it, let's go a little further. So Mr. McClellan and I took a horse and rode until midnight, into Ventura county. Now we are not narrow enough to say we are limiting the development of this great country of ours to one little county, because Ventura is so closely connected with this situation that all the people's outlet is directly to Los Angeles county for a market, and to Santa Monica. You can see
3185 how the road is being developed because it is developed and they have a good road without any apparent cost to the Rindge Ranch, but when you get to the Rindge Ranch you have no road all the way through. The day I was there the Rindge riders rode up,—and a nicer set of men never lived,—and I heard those Rindge riders say to those people themselves, "we wish it was so that you people had an outlet to the world," and I want to say to you, those people
3186 and the Rindge riders are personal friends, but they do feel Mrs. Rindge is absolutely standing in the light of civilization and standing in her own light, and standing in the light of progress that should not be tolerated further. Those people have got their property. She has got hers. Those people are not asking this county to take her property for nothing. I agreed with the decisions of the Supreme Court; I agreed with the proposition that if there had never been a dedicated road the county had no legal right to it.

3187 I agreed with her on that point, but when it comes to the point of condemnation steps being taken * * * each one of us and every property owner has a right, by the privilege of living in a great, democratic country, under the right of eminent domain, to compensation for whatever property is taken. And the time is long since past when 21 miles of the only ranch which is an absolute barrier to travel and traffic should
3188 bar the trail of civilization. Is Mrs. Rindge's property so sacred that it should be immune from the eminent domain laws when the condemnation steps are taken and paid for? It seems to me that it comes to an intolerable situation. There those people are—as good people as ever God let live—raising families; their school houses are 7, 8 and 10 miles across the canyon. Their little church and school house are just as dear to them as our palatial structures. It is
3189 not right for civilization to stand and this board to retract its honest efforts, made a year ago when they instructed the county counsel to proceed. Mr. McClellan did not come to that conclusion until after he had spent night after night, and I want to say to you I saw him ride all night through that country and sleep in a little old hovel there, with vermin and bedbugs, in order that he might have an opportunity to see the rights of those people. I know he went from one end of that community to the other,

3190 and you can't tell me he don't know exactly what he is talking about. And when he came back and told this board and voted for the condemnation, and changed his mind by doing so, I admire him for being one of the noblest citizens of Los Angeles county. Because, gentlemen, he went there without prejudice. I went there with a prejudice, but when we came back, I don't care for my little interest of property, if the Government wants it it can have it, if it is
3191 necessary to have every inch of it for a road they can have it. Gentlemen, this talk of patriotism by the Rindge interests is a subterfuge. If they don't want these people to have a road it is selfishness against selfishness. They say we have a right to put our selfishness against these people's selfishness, and Mr. Newby is big enough to concede it. Where are the Rindges losing anything? They are getting
3192 pay for what they give up—40 feet wide by 40 miles—less than 100 acres. Now, there is a road already there. They have a road of their own. Now, they are not developing that road and raising any grain on it. I have gone over every inch of that road, and I want to tell you gentlemen, I can drive from Los Angeles county to Ventura county right on that road with a wagon with three-quarters of a ton of beans, and you don't have to do one dollar's worth of work; but let us assume you are going to

3193 give them a few dollars to make a little country road, not a boulevard, but a little road through there to satisfy their demands. That little community will send more than 20 men into the firing line. Isn't it right and fair—what more patriotic act from you and I than to offer those women and children, those old and infirm, an opportunity to develop those thousands of acres there? It is not only the cultivated land that
3194 must be taken into consideration, there are thousands of acres that can be put into pasture. Give them a right of way there; build the road where you can, and if they say it is going to cost something to take it, there is one way they can save every dollar of cost; agree with the county what it is worth, and the county will take a deed for it. But they say if you don't do anything else we will fight you. That is what they have been doing for 30 years. These blue-blooded
3195 Americans say let them come and fight, but don't come here at the last moment, when they see they are backed up against the wall, and when there is no legal argument left for them, seek the last subterfuge, and that is patriotism. Let them say what their property is worth. Let's pay them, and the whole thing won't come to $10,000 and what is $10,000? All right, if they say they want to cut out legal expenses; if they have spent thousands of dollars; they have changed counsel three times. Gentlemen, I

3196 don't know when they are going to stop, but Los Angeles county is too big, and its citizenship is too great, and its future is too paramount to have all this country absolutely shut off. Men, go just as far as you can now, so you can get as much advance on them as you can. If they go to the Supreme Court let them go, but don't let them draw us in by this subterfuge into a by-path and by-track on the ground of
3197 patriotism and loss of money.

'Mr. C. W. Lyon: Mr. Chairman, and members of the board of supervisors: I won't take up much of your time. I simply want to say to you I represent the trustees of the city of Venice and chamber of commerce there, and say we are heartily in favor, all of us, of the project of putting the road through the Malibu. * * *.

'Mr. McClellan: I move we deny the petition
3198 to discontinue the suit and go on with the condemnation proceedings.

'Mr. Hamilton: Moved and seconded the petition be denied, and the county counsel instructed to proceed with the suit. Are you ready for the question? The clerk will call the roll.

(Roll call: Ayes: Supervisors Delorey, McClellan, Dodge and Hamilton. Noes, none.)"

3199 H. I. COMLY,

recalled.

Direct Examination

By Mr. Burnell:

Q. Calling your attention again to Defendant's Exhibit No. 6, of the United States Geological Survey map now on the blackboard, I will ask you if you can trace the course of the highest point, or the course of the ridge of the Santa
3200 Monica Mountains between the northern boundary of the Malibu Ranch, and the state highway, between the county line and Topanga Canyon.

Mr. Anderson: On that map?

Mr. Burnell: Yes.

A. Yes.

Q. I will ask you to go to the map and with the colored pencil, follow the course of that ridge. A. Yes, sir.

Q. Now, tell us what the course that you
3201 have marked out, what it is on the map. A. I have placed on the map a line over the ridge as shown by the contour lines on the map. The contour lines mean the continuous elevation. They show that every point on the same contour line is of the same elevation. All those contour lines show that, and by that I am enabled by looking at the map to determine the elevation of the ridge.

Q. Now, take the pointer and trace that place so that the jury will understand it and

3202 as you trace it, you might refer to any particular point or points at the elevation, and what the points are, if you are familiar with it. A. Right here at the Ventura county line it commences at an elevation of 2500 feet and goes along that ridge until you reach—

Q. Going to the letter "S" in the words "Santa Monica Mountains"? A. Yes, to a point just southwest of the figures 2076, near the corner of the old Conejo Ranch. Then in
3203 a southwesterly direction following the ridge to a point marked X-10, near the center of section 12, and then in a northeasterly direction to a point near the north line of section 12, following the elevation given as 2039, then in a southeasterly direction passing through the point "A" in "Santa Monica Mountains" and below the bench mark point No. 2419, then generally to the direction on top of the ridges until we
3204 reach bench mark 2173, just west of Mesa Peak; then southerly and easterly across the 1 range line at a point shown by R 18 W; thence continuing in an easterly direction passing through the bench mark to point bench mark elevation 1699, then following up the ridge until we come to Saddle Peak; thence in a generally northerly direction following the various ridges until we reach the bench mark at elevation 2169 at Calabasas Peak; then in a northeasterly direction passing over the word "line" in "San Ber-

3205 nardino Base Line," then still northeasterly passing north of the "A" in the word "Mountain" in "Santa Monica Mountains" to a point at Garapetus Creek at the present location of the Topanga Canyon road, at a point just southwest of the "M" in the word "Mountain" in "Santa Monica Mountains." (Witness marks on map.) It is marked "summit of ridge." (Witness writes name on map.)

Cross-Examination

3206 By Mr. Newby:

I have never surveyed that line, and I placed it simply from the map. It is a fact that on the north as well as the south of this line that I have marked to indicate the crest of the mountains, there are valleys. And this line itself is broken by a valley, in one place, I believe, at the Malibu Creek. That is the only place that has any break in that line, at the
3207 junction of Coal Creek and Malibu. Coal Creek flows into Malibu Creek through that opening. There are peaks and then there are lower places between those peaks on that line. That is true with reference to the entire line, that there are peaks with depressions in between the peaks. The elevation at the Marion Decker house marked on the map as X-11, is about 1000. At Vaughn's place, X-5, 1500. The elevation at the point where the red line which I have just placed on the map intersects the yellow line just

3208 southwest of the letter "S" in the word "Santa" is 1850. The elevation at the northerly line of the Malibu Ranch where it is intersected by Alisos Canyon is about 900 feet. The elevation at X-3 being the Charlie Decker house, is about a thousand or a little over. The correct elevation is 1033. The elevation at the point where the yellow road which we have called the Decker road intersects the black line which represents
3209 the grant line, just southeast of the figures 2706, is 1800 feet. The elevation where the plain yellow line representing the Decker road strikes the Ventura county line, is 1100. The elevation where that same road intersects the Old Conejo road is 900. The elevation where the Old Conejo road intersects the Cornell and Triunfo road is a little less than 900. That is just south of the letter "S" in "Russell." The elevation at Triunfo post-office is about a thou-
3210 sand feet. The elevation at Cornell is about 900. The highest point in that Nigger Hill section is 1900 feet. The elevation at a point where the red line which I have placed on the map intersects the Sierra Canyon road is 1900 feet. The elevation at the Shirley slide, which is about the end in the word "Santa" just north of the red line, north of section 13, is about 1900 feet. The highest elevation from Cornell to the Charlie Decker house is about 1900. The lowest, Cornell, is 800. It is not

3211 a gradual rise from Cornell, which is 800 feet elevation, to the 1900 feet elevation, which is at the Shirley grade. There is a rise until you reach this 1900 foot elevation, which is at the Shirley grade. Between Shirley grade and Charlie Decker's the highest elevation is about 1650 feet. That is a place called Barney's Knob. It is about two miles or a mile and a half southwest of Vaughn's place and is marked
3212 X-9, I believe. Vaughn's is X-5, close to the point marked X-16. That is after you pass Vaughn's and turn south in the direction of Decker's.

Redirect Examination

By Mr. Burnell:

The Witness: The water shed determines the location of the crest of the mountains. In this way, from the summit, as shown here, the water flows to the south on one side and north
3213 on the other, with the exception of Malibu Creek, which is a break through the entire range, the only break between Topanga Canyon and the Ventura line. Malibu Creek flows through a canyon that cuts right through the range. With that exception the water flows either from my red line indicating the crest, to the south toward the Malibu Ranch, or towards the north and the state highway.

Q. Now, I want to ask you to start on the map from the Decker place that bears the

3214 number X-3, the Charlie Decker place, and trace the road from there to Triunfo post-office along the yellow line that has been pointed out as the way by which the people from Charlie Decker's house travel to reach the state highway at Triunfo, stating as you go along the points of elevation, and whether you go up or down to reach those points and the approximate distance between those points.

Mr. Newby: That is from X-3 to Triunfo?

3215 Mr. Burnell: Yes, sir, along the so-called Decker road to Triunfo. A. Leaving the Decker place at X-3, at an elevation of 1033, there is an upgrade for about a mile until we reach an elevation of about 1400. For about half a mile it is an upgrade until we reach an elevation of about 1600 or 1650. That 1600 elevation is about at the point marked 16-X. Then for about a mile it is down grade—both

3216 down and up grade, a rolling country, until you reach Vaughn's place, X-5, at an elevation of about 1500 feet. Then it is an up grade with some small down grade for about a mile and a half until you reach an elevation of 1850 at what is known as Tecumseh Pas near the letter "S" in "Santa Monica Mountains." Down grade until an elevation of about 1800 at the crossing of the El Conejo Ranch line near the point marked 2076. That is about a half a mile. Then it is down grade for about one mile until

3217 we reach an elevation of about 1200 feet at a distance of about a half mile southeast of where the Decker road crosses the county line. At the county line the elevation is about 1100 feet. From the crossing at the county line to the Decker road it is down grade for about three-quarters of a mile until we reach what is known as Little Lake or Dam at an elevation of about 1000 feet; down grade for another
3218 half mile or three-quarters miles until we reach the El Conejo road at an elevation of about 900 feet. Then it is practically level for about a mile or a mile and a quarter until we reach the Russell Ranch buildings at an elevation of less than 900 feet. Then it is up grade slightly for about a mile to Triunfo post-office at an elevation of about 1000 feet.

Q. Now, I will ask you to trace in the same manner the road to Cornell, beginning, if you
3219 please, at the point where the road branches off, the road just described a little bit north of X-5. A. It branches off a little northeast of X-5 and starts on a down grade, starting at an elevation of 1600 feet to the bottom of Trancas Canyon, at an elevation of about 1250 feet. Then it is up grade for a mile, to near the center of section 11 at an elevation of 1900 feet. Then it drops down for about three-quarters of a mile or about a half a mile to a branch of the Zuma Canyon at an elevation of 1700 feet.

3220 Then there is an up grade for about a quarter of a mile to the crossing of the summit at an elevation of 1900 feet, and then for a distance of about three-quarters of a mile through rolling country until it reaches the point near the eastern side of section 12 at an elevation of 1800 feet. Then it drops down for a distance of about a little over a quarter of a mile to the bottom of a branch canyon of Zuma Canyon at
3221 an elevation of 1650 feet. Then it is up grade for about three-quarters of a mile where we cross the summit about the center of section 7 at an elevation of 1900 feet. Then it drops down for a distance of about three-quarters of a mile to the east line of section 7 at an elevation of about 1000 feet. And then for a distance of a little over a mile, to Cornell, it is on a slight down grade until we reach an elevation of about 800 feet at Cornell. Going to Triunfo
3222 from Cornell in a northwesterly direction, for about three-quarters of a mile to the mouth of Love Canyon, at an elevation of 900 feet; then in a northeasterly direction for about three-quarters of a mile—northwesterly direction I mean—along the Triunfo Canyon to the intersection of the southeast line of the El Conejo Ranch at an elevation of about 950 feet—that elevation is a little less than 950 feet—it is nearer 900 feet. Then for about a mile and a half through Triunfo Canyon to the Russell

Ranch buildings. From there on I have described the route before. That elevation is a little less than 900 feet: From the place where I say the road runs from 1800 feet elevation to the elevation at 1650 is a quarter of a mile. That is about a 20 per cent. Where the road drops from an elevation of 1900 feet to an elevation of 1000 feet in about three-quarters of a mile, it would be about 30 per cent. grade. That is at Nigger Hill.

Q. Now, I will ask you to follow the same procedure and trace the course from the same point, Charley Decker's place, along the road shown in yellow to the junction of the proposed Los Alisos Canyon road and down the Los Alisos Canyon road to its junction with the proposed Malibu road near the beach. A. From Charlie Decker's place at X-3, it is a down grade until we cross the Malibu Ranch line at about an elevation of 900 feet or a little less. That distance is about a half a mile. Then it is level, or practically so, for about a quarter of a mile; and then for about a mile and a quarter, it is down grade until we reach an elevation of about 250 or 300 feet; and then for about a quarter of a mile it is down grade until we reach an elevation of about 90 or a hundred feet; and that would be at the point just before we reach the Malibu road at the junction of what is known as the beach road and the Los

3226 Alisos Canyon road. And then on the Los Alisos road is a down grade for about a quarter of a mile—or, it is practically level for about a quarter of a mile.

On the road which I have just traversed from the Decker place, X-3, down through the proposed right of way and the Los Alisos Canyon road to the main Malibu road, the greatest per cent of grade is about 14 per cent. There is about seven or eight hundred feet 14 per cent
3227 grade—a little less than that. I think about six or seven hundred feet.

Q. Now, in taking us over the road that you described as one of the roads—I think it was the road to Cornell that goes across the Trancas Canyon from the Charlie Decker place, you gave us the elevation down at the bottom and then from there down on the other side—I don't remember just the figures. Just give it to us
3228 again. What I want, Mr. Comly, is the elevation at the lowest point in Trancas Canyon that is crossed by the road from the Decker place to Cornell.

Mr. Newby: 1250 feet at the bottom, he has given.

Mr. Burnell: Is that right, Mr. Comly? A. Yes. The elevation at the top was 1900 feet. The road travels from the 1250 foot level to the 1900 foot level in about a mile at about a 12 or 14 per cent grade.

3229 *Recross-Examination*

By Mr. Newby:

The Witness: The percent of the grade on the Los Alisos road from the north line of the Malibu Ranch to the Charlie Decker place, X-3, is about six percent. From the junction of the Malibu road with the Los Alisos road to the north line of the ranch thereis a short piece of 14 per cent commencing at the main Malibu
3230 road and running for a distance of about six or seven hundred feet. It would average about seven or eight per cent. The point at which it connects or intersects the main point at which it connects or intersects the main Malibu road is at an elevation of about eight hundred feet. The elevation at the north grant line is about nine hundred feet, and the distance is a little less than two miles. The survey shows the length of that road to be one and nine-tenths miles.
3231 The Decker house is at an elevation of 1033 feet. The point of the intersection between the Los Alisos road and the Malibu road is at an elevation of about 100 feet. In order to reach the Charlie Decker house at X-3 over the proposed Los Alisos road it would not be necessary in traveling the distance of one and nine-tenths miles to make a rise of 933 feet, because you gave the difference in elevation from the Charlie Decker house to the road. You have to climb 933 feet in going from the junction of the Los

3232 Alisos road to the Malibu road, to the Charlie Decker house. In traveling from the junction of the Malibu and the Los Alisos road to the north end of the grant line you have to make a rise of about 800 feet. The average grade over that distance would be about seven or eight per cent.

Mr. Burnell: Now, there is just one other thing that we neglected. We were acting under
3233 the assumption that it had been done. That is, we desire to offer as exhibits or as an exhibit, the large map that was on the blackboard from which the witnesses on both sides have testified —that is, the copy which is attached to the complaint as Plaintiff's "Exhibit A" with the appropriate letter and number in serial form.

Mr. Anderson: We have no objection to that, it being understood that the objection as to certain legends on the map still stands.

3234 The Court: Remember that, gentlemen. In the early part of the case I directed you as to inscriptions on these maps, that you were not to accept that as proof of the fact.

Mr. Burnell: Your Honor does not by that refer to the designations "beach land," "pasture land" and that kind of statements.

The Court: All the geographical statements or geological statements made by proper authority will be considered.

3235 Mr. Burnell: Yes, I will state to Your Honor that we are not offering the maps for any purpose connected with the descriptions of the land as to pasture or cultivated, and that those are not to be considered as part of our offer. In other words, they are simply there and can not be very well taken off.

(Map admitted is one of the exhibits to be certified up.)

3236 Mr. Vallee: We might at this time, also, if Your Honor please, offer a map of the Los Alisos road.

(Map admitted, marked Plaintiff's "Exhibit E," and is one of the maps to be certified up.)

Mr. Burnell: I think that is all on our side, Your Honor.

F. G. DESSERY,

a witness called on behalf of the defendants in 3237 sur-rebuttal, being first duly sworn, testified as follows:

That he was a civil engineer and had been such since 1900.

Counsel for plaintiff thereupon stipulated Mr. Dessery's general qualifications as a civil engineer.

The witness further testified that he had installed an irrigation system in Zuma Canyon for the Rindge Company, of which the standpipes to be taken by the proposed right of way

3238 for the Main road formed a part; that these standpipes could not be moved to another location without wrecking them entirely; that to properly change the pipe line and standpipes would require the change or removal of about eight hundred feet of pipe line at a cost of from ninety cents to a dollar a foot and the reconstruction of the standpipes at a cost of about $50.00 each; that the change in the pipe line would necessitate an increased fixed charge in
3239 the maintenance and operation of the system, but just how much the witness could not say.

The standpipes affected are three in number.

The witness further testified that the present pipe line, as shown on Defendant's Exhibit No. 19, has curves in it. That it is not the curves as curves that interfere with the operation of the pipe line.

Q. Now, I am going to call your attention
3240 to a diagram which I will draw, and ask you a question about it. I am assuming that the line I am drawing is the pipe. I am not attempting to put it in the general direction, but just indicating the line I have drawn, as the pipe line on the ground. Now, supposing that you have a standpipe on that pipe line. What I want to find out is whether it would not be possible to take the standpipe out of here and move it and put it in another location, we will assume, south of where it is now, and instead

3241 of moving any appreciable amount of the pipe line, to bring an elbow to the box and one from the box to the other side, as I am indicating on this little diagram. Would that be anything impossible or impracticable? A. No, sir, that could be done.

Q. Now, if we assume for the moment that there is no necessity for removing the pipe line itself but that there is for moving the stand-
3242 pipe, and new stand-pipes would be located to connect up with the pipe line in the way that I indicated on the diagram— A. It could be constructed that way, yes.

Q. And that would obviate the expense of moving the pipe line, wouldn't it? A. Providing you, in so doing, did not put excess pressure on the pipe line.

I do not know whether the proposed road would or would not interfere with the pipe line,
3243 other than with the standpipes, as there is not enough detail on the proposed section to answer the proposed question.

Q. Assuming that the standpipes A, B and D have to be moved and that the cost of moving them will be $50 each, or $150 for the movement of the three, and assuming that that can be connected with the pipe line by elbows in the manner that I indicated in the question, in connection with which I drew the little diagram on the board, would you say that the cost of mov-

3244 ing the pipe line would be $800? A. It would not.

Q. What would the cost be under that arrangement? A. Exclusive of the boxes, probably a hundred dollars. Assuming it could be done, that would make the total cost of the changes, including the movement of the boxes, about two hundred and fifty dollars. When I told you it could be done, I qualified that by
3245 saying that if the ground at the location where they were to be moved is such that there would not be depressions in this gravity pipe line that would cause air pockets.

Q. If the ground in its natural elevation is such that it would cause air pockets, wouldn't it be entirely possible to raise it on a structure and keep it at its proper level? A. Yes. That would mean lowering your boxes and making higher boxes and a pipe line could be kept on
3246 a gradient. It is true that you could eliminate these air pockets, by moving the standpipes, and putting elbows on the main line, supporting them by a structure of some sort; by keeping them on a uniform hydraulic grade it could be done. I would have to know all the elements entering into the particular situation of those boxes before I could tell how expensive or how difficult, but it could be done. It is not impossible.

3247 A map of the irrigation system, made by the witness, was put in evidence and marked Defendant's Exhibit 19, and is one of the exhibits to be certified up to the Appellate Court by the clerk pursuant to the stipulation heretofore set out.

H. I. COMLY,

recalled for further cross-examination.

Cross-Examination

3248 By Mr. Anderson:

I assisted in a survey of a road from Los Alisos Canyon to Russell Valley made in the months of February and March, 1917.

Mr. Anderson: Will you gentlemen stipulate, subject to any objection you may have, to the resolution itself, that this survey in question was made pursuant to a resolution of February 1, 1917, found at page 214 of road book 18.

3249 Mr. Burnell Why, yes, but I think that the resolution should be read into the record.

Mr. Anderson: The resolution in question reads as follows—I have already given the date and page. This was February 1st, 1917, and minutes read:

"The board met pursuant to adjournment. Present: Supervisors, J. J. Hamilton, chairman presiding; R. H. Norton, F. E. Woodley, R. F. McClellan and J. S. Dodge.

3250 "*In re* road from Russell Valley to Los Alisos Canyon: Order authorizing survey.

"On motion of Supervisor Woodley, duly seconded and carried, and in accordance with recommendations by the county counsel and the county surveyor it is ordered that the county surveyor be, and is hereby authorized and requested to make surveys necessary for preparation for deed for right of way for a road extending from the Malloy ranch house in Rus-
3251 sell Valley to the house of Charles Decker in Los Alisos Canyon, in Road District No. 5."

By Mr. Anderson: The Meloy ranch house with reference to Meloy Hill is south of it. The survey is from the Meloy ranch house and Russell Valley to the house of Charles Decker. That ranch house is south of what we have been talking of as the Meloy Hill. It is on the Decker side of the Meloy Hill. The profile I
3252 have covers the survey of the Meloy Hill. The document that I have in my hand is the profile of the survey. It extends from a point near the Decker house to the Ventura county line, covers the Meloy Hill section; and that road is approximately along the route that is now traveled that we have been calling the Decker road here. The vertical scale of this map, one inch equals 20 feet, and horizontal scale one inch equals 80 feet. These figures that appear from point to point—for instance the figure

3253 1150, 1200, 1250, and 1300 represent elevation. The elevations of this survey are correctly shown, that is, the elevations at the points over which this survey passes are correctly shown on this map. Those figures represent a space of 50 feet in elevation. This point of proposed road or surveyed road between those points is the actual elevation. The dark comparatively straight line is the profile of the surveyed road. The heavy black line is the center line of the
3254 proposed road, the one up and down. I have cuts and fills indicated on the map. The difference between the pencil line and the heavy black line would show the cuts and fills. In other words, if the road was constructed according to the survey it would be cut down or filled up to a level with the pencil line. That would then be the red line.

Q. I call your attention to the pencil nota-
3255 tions near the figures 1300-1250. That is north, isn't it, I think so; and I will call your attention to this and ask you what the pencil mark 15 per cent. indicates and again the 1.0 per cent. and 11 per cent. What does that indicate? A. Grades. That is the percentage of grades at the proposed line. I believe that is true throughout the map unless there is some there that is not correct; that line has been changed. That is what I intended it to represent and so far as I know it is approximately correct. I can take

3256 the profile and indicate at the top of the map from section to section what part of the road it covers.

Mr. Anderson: I think that that is the better way to do that, otherwise I would have to go into it now.

The Court: Can't you do that now from the notes you have; wouldn't the notes show it?

Mr. Anderson: This profile has a number of
3257 things on it.

Mr. Burnell: Do you mean the surveyor's sections.

Mr. Anderson: Yes.

Mr. Burnell: I think it would be the best way.

The Witness: I could not do it from my notes.

Mr. Anderson: Also we want to offer the profile in evidence.

3258 Mr. Burnell: That is objected to on the ground that we urged to the resolution and upon the additional ground that it has not been shown that this profile has ever been accepted by the board of supervisors.

The Court: Overruled. The same ruling will be made as has been made with respect to the resolution.

(The profile in question was received in evidence and it or a copy of it is one of the exhibits to be certified up.)

3259 Monday, November 25, 1918, 10 o'clock a. m.

W. SIMES,

recalled in behalf of the defendant, testified as follows:

Direct Examination

By Mr. Anderson:

I live at Cornell. That is the point indicated on this map (Exhibit 6) by the word "Cornell," where one of the yellow roads runs into the
3260 other. I have lived there three years the 10th of last August. I have the hot mineral springs and the postoffice there. The hot mineral springs located at that point. We run it as a resort. I am familiar with the road that runs from Triunfo—that is, from Cornell to Triunfo, up through the Russell Ranch. I have been familiar with that three years from the 10th of last August. I drove the mail wagon over it
3261 for seven months. It certainly is a passable wagon road. It is better now than it was three years ago. Three years ago it was always used by wagons. Automobiles came in there when I went there—the first summer that I went there. That has continued; I counted 53 in there, in one day, in my yard. That road has got some little steep grades. The longest grade is about twice as long as this room. I wouldn't know about the percentage; machines go up; no difficulty in getting up that I ever observed. My

3262 place, where I parked the 53 machines, is right in Cornell, right at the postoffice, where the hot springs are. I suppose the road which I am speaking of, which I have described here, is the road running from Triunfo on the state highway over to Cornell, as shown on the map, Defendant's Exhibit No. 6, the road marked in yellow on the map. It is the only road from Triunfo to Cornell. There is only one road, without you go by Zeres station; that is six
3263 miles nearer. There are some machines come this way. The regular road everybody travels over is the road from Triunfo to Cornell. The time of the year I had 53 machines parked at my place was in August and September; the first week of September, during the hunting season. These machines were machines of people who came up to hunt and take the baths. I carried the mail seven months; it was along
3264 in the summer, up until late in the fall the roads began to get very muddy. They begin to get muddy along in January. They don't get impassable; it is the creek you have to cross. The creek going from Triunfo to Cornell is the same creek you cross about five times. I would say that it was possible for automobiles in the rainy season, in the condition in which I know that road, to get through up as far as Russell's gate. Russell's gate is on the Russell Ranch, on the Ventura county side; I mean from

Triunfo to the Ventura county line; that is very adobe. It is about a mile and a quarter from the highway to the end of the Ventura county line. That is a part of the road that is passable for automobiles; they can get through, but it is dobe, part of it is gravel. From December to March automobiles cannot pass over the road from Triunfo to Cornell and come through from Triunfo as far as Cornell, because they could not get across the creeks. There was five machines in to my place yesterday, only the one way to come, from Triunfo. The road is in better condition now than three years ago. It was in such condition three years ago that machines could get through from Triunfo to my place at this time of year. There has been machines in there at Christmas time. It was dry last year up to January. That is the time that the machines came through. During the rainy season, when it was actually raining, or within a few days after a heavy rain, I have seen machines go over that road. We have had two or three days rain last week; we had a heavy rain Saturday night. During the months of January and February, that road is not traveled by automobiles very much; simply because they can't get across the creek. It is much traveled by other vehicles than automobiles, say by wagons, during the months of January and February. The mail comes in every day. It

only missed twice last year, that is, as far as Cornell. There is travel beyond Cornell up in the mountains in the months of January and February; they are hauling stuff in there; leave it at my place and take it up in small loads in the winter. They take the loads off the wagons and take lighter loads. They take up twelve or fifteen hundred; they take that up in small quantities.

Recross-Examination

By Mr. Burnell:

Q. Mr. Simes, referring to the truck that you say passed Cornell, how far from Cornell did that truck go, to your own personal knowledge—not what some one told you, but what you saw yourself? A. I will tell you where those machines went this summer.

Q. Of your own knowledge—not what someone told you. A. Yes. I seen them camp there. They went to what they call Mrs. Haynes. They had a camp there where they were hunting, and this truck had six men on besides five dogs, besides the provisions and a tent. That was a hunting outfit. Mrs. Haynes' place, I would say, is about 2 or 3 miles from my place. That is where these machines went. They went there to hunt. Mr. Decker had the place rented. At the time that I saw this load of 1800 pounds being taken down to Cornell, there was two horses put on the load. The

load stopped in front of my place and took the parcels post stuff with him. I will tell you how I know the load was 1800 pounds. I asked him how much he had on and he said he had on 2000 or 2200, and I told him I would bet him a dollar that he didn't, that he didn't have more than 1800. We were talking about it.

Q. Well, what happened then? A. Well, that was all there was to it.

The Court: Did you weigh the load? A. No.

The Court: You simply infer that you were right. He said he had 2000 on? A. Yes, he said he had 2000 or 2200.

The Court: You were willing to bet a dollar that he only had 1800? A. Yes.

The Court: You didn't make the bet? A. No, he didn't. That is the extent of my knowledge as to the weight of the load.

Redirect Examination

By Mr. Anderson:

I examined the load. It was weather boarding and stuff, and there was five sacks of grain on, and I think a cultivator, and there was three or four packages of parcels post, canned goods and groceries. This Haynes place is up over Nigger Hill. You have to go over Nigger Hill to get to Haynes,' The load that I bet on went to Mr. Rumples. I didn't see it go over; I

3274 didn't follow the load. When I saw it it was in front of the house at Cornell. I don't know whether some of that load was taken off going over Nigger Hill or not. I don't know where they put it; they generally leave it there when they don't haul it. All I know is that this was a load which I thought weighed 1800 pounds, and the other man said it weighed 2,000 pounds, and then it moved off and that was the last I saw of it.

3275

Redirect Examination

By Mr. Anderson:

They haul to my place and then haul on in smaller loads. That is up Nigger Hill. The largest load I have seen them take up Nigger Hill with a two-horse wagon I seen them take up about 1800. I have seen automobiles go up there; I have seen machines go there this summer. It was in the month of September; there

3276 was a good many machines went up. Some went up this summer—more went up this summer than I ever seen before. There was one closed machine and there was a truck went up. I didn't believe they could get up, but they went up. I don't know what makes they were. They went right past my house and went up over the hill.

Q. Which is the part of the road in the rainy season when the creeks run down that is difficult to travel? Is it the road from Triunfo

3277 to the Ventura county line, or the road from the Ventura county line to Cornell that is difficult to travel in the winter on account of the mud? A. Well, both roads from the highway, but when it leaves Triunfo down to the Ventura line, it is adobe.

Mr. Anderson: And that is the hard part? A. Yes. Part of it is gravel. I said a mile and a quarter of road there that is bad. Now,
3278 Mr. Russell and those men have got it graveled half way, and it is only probably a half a mile there that is dobe. The road from the Ventura county line on the Cornell—that is, from the Russell Ranch on to Cornell after the creeks become passable, is good, I would say, for a mountain road. After the average winter storm it takes a couple of days or maybe a day for the creeks to run down.

Mr. Vallee: Now, at the time Mr. Anderson
3279 introduced the petition of the Rindge interests to the board, he stated that he didn't have the copy of the original letter that was sent to Mrs. Rindge and the Rindge Company from the board of supervisors, and asked us to produce a copy.

Mr. Anderson: No objection to that whatever. I don't think it is necessary, because it is agreed that we were all there, and that there was a hearing.

3280 Mr. Vallee: And that you received notice of the hearing?

Mr. Anderson: And that we received notice of the hearing.

Mr. Vallee: You stipulate to that.

Mr. Anderson: Yes, that is, as to both hearings we stipulate.

Mr. Vallee: As to both.

Mr. Anderson: As to both, yes. We cer-
3281 tainly had notice, or we would not have been there.

Mr. Vallee: So far as this particular phase of the case is concerned, at this time we rest on it.

Deposition of

MRS. HARRIET WILBURN,

a witness produced on behalf of the defendants:

"Direct Examination

3282 By Mr. Newby:

My name is Harriet Wilburn. I reside near Bakersfield. My business is teacher. I have been a teacher about 18 years. In the year 1914 I was teaching in the Decker District in this county; it was the last part of August, 1914. I taught at the Decker school for nine months, beginning about September 15th, 1914, and ending about June 4th. During that period of time eight children attended school at the Decker school house; four of them were my

3283 children. The other four belonged to the Decker family. At the time of my employment as a teacher for the Decker school, I think that no one was present except the Decker family. Mr. and Mrs. Decker were two members of the board and the other members of the board weren't present at all. Mr. Lowe, assistant superintendent, was not. He was there when we was talking it over, but when the contract
3284 was made he wasn't present. Information was given to me as to the requirement for a teacher; of course I had to be a qualified teacher of the county and the requirements were that I was to have at least four children of school age in order to make up the quota for the district, and I was to rent a cottage Mr. and Mrs. Decker were then building, paying them $15 a month. Mr. and Mrs. Decker informed me that that would be necessary. Mr. Lowe gave
3285 me information on that question, and Mr. Keppel, the county superintendent, told me that was the ground on which they were employing me because there are children to make up the number required and also to bring more money into the district, of course. I did not teach there after the summer of 1915, as I understand.

Q. At the time of your employment or any time prior thereto was there any suggestion made either by any member of the board or any county official as to securing extra children

for the Decker district? A. Well, no one but Mr. and Mrs. Decker spoke to me about it to see if I could get some probation children to take out there to board, and they asked me to do that. I did not do it because they expected me to board them, understand, and it was too much. I didn't attempt it. We lived at the home of Mr. Decker for three weeks until they prepared our house and then we lived in a separate cottage, about an eighth of a mile from the school house. Charles Decker was the name and I don't remember name at all; she was his wife."

"Cross-Examination

By Mr. O'Connor:

Q. In saying that only eight children attended school in Decker School District during the year of 1914-15 do you mean that that number included all the children of school age within the district during that time? A. That was absolutely all the children that there were ther

Q. There were no children then of school age belonging to any family in that district other than those of your family and those of Mr. Charles Decker's family? A. There were not none at all excepting those two families."

The defendants at this juncture moved the court to dismiss each of the said actions upon the ground that the respective complaints, and

each thereof, failed to state a cause of action particularly in that it appears on the face of the complaints in each action that there had been no compliance with the provisions of article VI of chap. 2 of title VI of part III (Secs. 2681 to 2698, both inclusive) of the Political Code in the matter of the laying out and establishing of the proposed roads or highways for the respective uses of which the respective parcels of land involved respectively in said action were sought to be condemned.

This motion was argued at length, and was submitted to the court for its decision, and the court after considering the same denied the same as to each of the said cases.

To this ruling the defendants then and there excepted.

Exception No. 57.

That thereafter the following further proceedings were had and taken:

Mr. Anderson:

Now, if the court please, at this time I wish to make a motion to strike out certain testimony, the motion as to each portion being upon the ground that it is incompetent, irrelevant and immaterial, upon the ground that it has not been connected, according to the promise of counsel to connect, and particularly upon the ground that the evidence shows on its face that none of the settlers in the Yerba Buena District, to

3292 whose testimony this motion is addressed, have any means of access at any point to either of the three roads in question. (Referring to the so-called main road, the so-called Alisos Canyon road, and the so-called Beach road, the latter not being involved in this bill of exceptions.) The basis of that objection I will point out briefly after I state the motion.

Thereupon upon the grounds stated the de-
3293 fendants moved the court to strike out all of the testimony of the following witnesses in so far as the same, or any part of the same, related to the conditions surrounding the Yerba Buena settlement or the Yerba Buena settlers or the means of access to and from said Yerba Buena settlement:

From the testimony of Ernest F. Decker:

From the testimony of Jacob H. Richter; being the whole of the testimony of said wit-
3294 ness:

From the testimony of John Fitzpatrick:

From the testimony of M. A. Vennaman, being the whole of the testimony of said witness:

From the testimony of Mary LaFonde, being all of the testimony of said witness; and,

From the testimony of Kenton A. Miller.

In each of these instances the particular testimony to which the motion is addressed was specifically pointed out with great particularity, and the motion was in every respect correct

3295 in form, and did not embrace any matters that did not relate to the Yerba Buena settlement and the conditions surrounding it and its settlers, nor any matters to which an objection was not taken and reserved at the time the testimony was admitted.

The court denied this motion, and each and every part thereof, as to each and every part of the said testimony of the said witnesses to
3296 which the same was addressed; but that said denial was made upon the merits of the motion, towit: because the court deemed the grounds of the motion not well taken, and was not based upon any technical defect in the motion, or in any part thereof, or upon the ground that the same, or any part thereof, contained matters which were not germain to the particular point raised by said motion.

To this ruling, and to the whole thereof, and
3297 to each and every part thereof, the defendants then and there duly excepted.

Exception No. 58.

In support of this motion and prior to the ruling thereon, Mr. Anderson, on behalf of the defendants, made the following statement in elaboration of the grounds thereof:

"Now the whole point of the objection is simply this, that it is demonstrated from the evidence that the Yerba Buena settlers had no means of ingress or egress by way of any wagon

3298 road from their settlement to what is known as the Triunfo-Decker road on the east, or to any point that would connect with the main road at the Ventura county line, the testimony showing two things conclusively: 1st—that the only traveled road, the only road on the ranch at the present time, is exactly 400 feet to the north of the point where the proposed main highway ends, and, further, that the only road that is even traveled by the settlers to reach
3299 the ranch proper is a road that enters the private property of the Rindges at the point in red (on Exhibit 6) approximately a mile and a half from the Ventura county line.

"They have no means of ingress or egress to the proposed main road, and they have never had to any point where the proposed road now lies excepting over the private property" (of the Rindge Company).

3300 Mr. Burnell: If Your Honor please, the theory upon which the testimony was introduced was that it would be connected up by showing that there has been a road whereby the Yerba Buena people might obtain access to the so-called main road. Your Honor had already ruled against us, on the theory that we might introduce the evidence of these settlers as to whether or not they could get up there to the main Malibu road by the lateral roads, so that question is no longer an open question.

3301 Your Honor ruled against us on that and we must submit with grace although not with conviction to Your Honor's ruling. As to these particular settlers' testimony, and I don't think it is necessary for me to refer to them specifically, that is the specific testimony, I think your Honor has it in mind, it was that for years they had traveled over a road which some of them referred to as the old Mundell road and others referred to it as the Marion Harris
3302 Jasper Thomas road, and they testified with unanimity that this road end ended just where the proposed Malibu road ends, at the state line.

Mr. Anderson: Only one witness testified to that.

Mr. Burnell: My recollection is not the same as yours but the record is here and it will show. My recollection is that others testified as to
3303 using that road. At any rate, if only one person testified to that, there is testimony which we promised to furnish showing that for a long time settlers had had access to the point where the proposed road comes in over a road which they used freely, which all persons traveling in that community used without let or hindrance until I believe, within a short time ago when a gate was placed across the road by the Rindge interests. That would cut no effect, however, if it was a public road. They

could not make a private road out of it by obstructing it. There is no testimony to show that it was a dedicated road or that it had been acquired by dedication, but I take it it is sufficient to show that it is a road that has been generally and publicly used by the public for years. If we were seeking affirmatively to establish the fact that there was a public highway it might be that that would not be sufficient. I say it might be. I don't know as it would. But we are not offering it on that theory. We are offering it upon the theory that the fact that a road had been used for a number of years at least raises a very strong presumption that it is used with right, that it is a road over which everybody has a right to travel and the fact that they have traveled it without let or hindrance indicates that it has been made a road by some method because if it is private land, the public would not be allowed to go over it freely, so that we think upon that score, the evidence is sufficient. Now if Your Honor please, we hardly expected this motion to be brought up this morning so we are not very well prepared to argue it. So, I am not going to take up a lot of time—

The Court: May I suggest this to you. That in view of the fact that the motion is quite voluminous and will require a good deal of examination, that when the case proceeds

this afternoon, that a ruling upon this motion will be made at the conclusion of the case.

Mr. Anderson: That is agreeable to me, and I think Your Honor has been on the ground and seen the physical conditions and Your Honor knows that the testimony of Mr. Fitzpatrick—I have every confidence that that is the only testimony which was given and it obviously must have been some other stakes that he saw because it is a physical fact and that testimony, does not raise a conflict.

The Court: I only made the suggestion to obviate some delay.

Mr. Burnell: Now first, I will cite to Your Honor two California cases: Patterson v. Munyan, 93 Cal. 128, reading from page 131.

(Counsel reads to the court.)

I simply cite that in furtherance of what I suggested a moment ago that the fact that a road has been openly traveled raises a strong presumption that that is a public road. The Supreme Court of Michigan has also delivered itself of some wisdom in that line in the case of Wickes v. Ross, 37 Michigan 464, reading from page 466:

(Counsel reads to the court.)

Now I have referred to a case in the 18th Maine, page 409, Young v. The Inhabitants of Garland and the question is whether a cer-

3310 tain strip of land is a road or not and at the end of the opinion, the court says:

(Counsel reads to the court.)

The Court: What have those decisions to do with the decision of Judge Henshaw?

Mr. Burnell: This, Your Honor, that if the object of the action is to declare a certain road a public road, to show that a public road exists, we cannot rely merely on the proof that a strip of ground, more or less indefinite, not located
3311 in a fixed place, is a public road. More particularly is that true when the attempted proof shows that the road in question was a wandering thing governed by the position of sand and tides on the beach. But that decision would have no bearing in a case where the proof was merely for the purpose of showing that certain people had access by a travelled highway to another certain point. Now, it may be that such a road was never dedicated and it is not a public
3312 highway. I am simply saying that that raises a presumption that it was, which has not been rebutted. These people traveled for years over that road and nobody stopped them. Now, there is one other point I want to suggest which I do with some diffidence, because we don't want to try to reopen a matter which has been ruled on, but I don't think that we argued this point before.

3313 GEORGE A. FREMLING,

a witness called on behalf of the defendants, being first duly sworn, testified as follows:

That he lives at Cornell, and has lived in that vicinity about 12 years; that he is familiar with the road that runs from Cornell to Triunfo described by the witness Sims, and had been traveling over that road at least once or twice a month for 12 years; that it was a pretty good
3314 road for wagons and teams, could be used for automobiles, and had seen them use it; that it has become better since he first knew it, is still usable for automobiles and wagons, and has no heavy grades; that you cross the creek between Triunfo and Cornell 5 times; that he has traveled the road in rainy seasons, and that aside from the time that the creeks are in flood and are impassable by reason of water it is a very good road, but could be better.

3315 On cross-examination this witness testified that he had traveled the road in an automobile several times, made a practice for a period of 28 months up to last March of going home from Los Angeles every Saturday, but did not always travel by automobile; that part of the time he used a Ford, part a Chandler, and on one occasion a Buick; that he also went by automobile stage which made regular trips, but did not want to give the impression that he could get in there on every occasion, but was never held up; that

3316 he usually went by the Russell Ranch; sometimes but very seldom by way of Dejo; that the usual route of the stage was through Russell Ranch; that there were gates on the road, remembers 5, which were kept open or closed according to the season.

On re-direct examination he testified that he had used the road up Nigger Hill beyond Cornell, clear through to the coast clear to the end near Decker's; that he had driven teams up
3317 there with loads; that he had never weighed the road, but had hauled loads up with 2 horses that he estimated weighed 1500 pounds; that he had seen others use the road, with pretty near every kind of a vehicle—wagons, buggies, surreys and automobiles ever since he has been in the country—that is, wagons; and automobiles in the last 6 or 7 years.

His testimony on re-cross examination was
3318 substantially to the same effect.

The following testimony was also given:

Q. Are you interested, Mr. Fremling, in a project to have a road put through from the state highway to Cornell? A. Am I interested in a project of a road from where?

Mr. Burnell: A road from Triunfo to Cornell, and then in a general easterly direction towards Topango Canyon and down the state highway to the ocean. A. Why, yes, I would like to see that. That would help the majority

3319 of the population of those hills to have such a road.

Q. In 1917 you took around a petition and attempted to secure signatures, to the board of supervisors to build such a road, did you not, in place of the proposed Malibu road? A. I signed a petition.

Q. Didn't you circulate a petition also? A. Yes, I got a couple of names.

3320 Q. What? A. I think I got a couple of names.

Q. This was a petition asking the board of supervisors to build such a road as I have described instead of the proposed road through the Malibu Ranch? A. Yes.

J. H. ROEBERT,

a witness called on behalf of defendant, being first duly sworn, testified as follows:

3321 That he resides about 3 miles beyond Cornell, and has for the last 2 month past and before that for about 12 years off and on; that he has been familiar with that country for 10 or 12 years; that in 1915 and since the road from Triunfo to Cornell was fair in dry weather, but in the rainy season it was pretty hard to cross the creek; that the adobe part of the road is about a mile from the state highway for about a half a mile through the alfalfa fields in the Russell Ranch; that the balance of the road is

3322 fairly good; that its condition after the streams dry up is fair; that he drives a Ford and found the road passable during those times; that he is familiar with the road beyond Cornell over Nigger Hill, lives up there and travels it frequently; that it is passable by wagon, and by automobile, part of the time; that after a rain you cannot get in with an automobile on account of the rocks; that it is not passable by a machine after the water has run off as the rocks are
3323 exposed and cut the tires; there is about 100 yards around Rocky Point that is pretty steep, which is the only bad place on the hill; that in other words the rocks stick up so high as to interfere with the machine, and then it is a little steep too; that aside from the times that the water washes out the road at Rocky Point he has seen vehicles go up and down Nigger Hill—two-horse teams with a ton load.

3324 On cross-examination that they used no other power than horses, and carried 2,000 lbs. up the hill with nothing but two horses; that he has not seen that done very often, but has seen several pretty good loads go up; I have also seen loads around a ton in weight partly unload, and the load be taken up the hill in instalments, many times. That is the usual method of handling loads of that size over that hill. Generally unpack; that a team hauling a load of 1500 to 2000 lbs. without unloading and taking

3325 it up in installments, and doing this regularly, wouldn't last very long; that a man who wanted to use his horses right wouldn't try it.

Mr. Anderson: I don't suppose a man that wanted to use his horses right would haul loads of that kind every day over those hills.

Mr. Burnell: Well, if that is stipulated to, all right. Now, I will ask you about this Rocky Point, do you know the grade at that strip there, what it is? A. No, sir, I don't; but I do know
3326 there is another road that started under that Rocky Point road. That road has been in existence for the last twelve years but has never been completed. The only way I ever went up from Cornell to the territory beyond Cornell is by the Nigger Hill road and Rocky Point road. That is the only way I know of to take a team up. That is the only road.

That the Rocky Point road is the only way
3327 he knows of to take a team out; that it is not merely usable in summer only, but all the time excepting after a rain.

Every rain washes it more or less; washes the loose dirt off, and then we fill it in. By "we" I mean the fellows that live up there. They have done all of the work on that road; voluntary work. The roads are sometimes exposed to such an extent that an automobile attempting to go up the road would hit the pan. That happened several times; it happened last

week, a fellow lost all his oil and had to go back down. I don't know what kind of a machine he had.

That it is pretty rough; that his car is a stock Ford; that he never had the gears changed or anything done to the tires; that he don't drive up Nigger Hill much; that he hasn't driven it up Nigger Hill for about 3 years, because he didn't have money enough to buy a new one, and figured that a man who drives a machine up Nigger Hill ought to be able to go out and buy a new one; and that is the way it has always been; that the rains upon the portions of the road crossed by the streams between Cornell and Triunfo usually washed the banks so that sometimes it makes a steep jumping off place in the road into the creek; that it might be possible at such times to drive an automobile over that road across the creek without fixing the road, but that the first man along fixes it; that all of the work of repairing the road after such rains is done by the people that live in that vicinity who have occasion to use it.

So far as I know, any part of the road work between Triunfo and my place that I ever heard of being done by anyone, is work done by people that live around there. There are gates on that road; that there are 5 or 6 or 7 gates on the road between Triunfo and Cornell.

3331 That some of those gates are between Cornell and the Ventura County line—about 4, and the rest between the Ventura County line and Triunfo where the road goes through the Russell Ranch; that the gates are sometimes closed, and that he thinks there are signs on the outside gate to shut the gates.

On re-direct examination he testified that those gates are never locked; that the banks of
3332 the stream are washed out by high water just like every other mountain road he has seen; that the road around Rock Point is a fine grade and all it needs is a little work.

I don't know of the county doing any work on any of those roads up there.

H. I. COMLY,

a witness having been previously sworn, was re-called and testified as follows:

Cross-Examination

3333 By Mr. Anderson:

Q. I will ask you if you put those section marks on since adjournment? A. Yes.

Q. That map that you hold in your hands, has that been identified by number? Can you give us some identification mark—what is the number, Mr. Comly? A. 343,572.

Q. No, the exhibit. A. No. 20. (This is the profile map of the Decker road survey, to be certified up by the clerk as one of the exhibits in this case.)

3334 Q. Now, calling your attention to that Exhibit No. 20, and asking you to look at the elevations at the southerly end, the end nearer the Rindge line, I will ask you if—comparing them with the map, Exhibit 6—I will ask you if it is not a fact that this survey of the map you hold in your hand commenced about half a mile from the edge of the Rindge property, the northern line of the Rindge property? A. This profile commenced about half a mile to the
3335 north.

Mr. Anderson: Mr. Comly furnished us at our request a list showing location and length of traveled road within proposed right of way of new Malibu road as shown on County Surveyor's Map No. 8070 (Exhibit "A"). I am not sure that this was put in evidence.

The document in question was then offered and received in evidence as Defendants' Exhibit
3336 21, and is one of the exhibits to be certified up by the clerk.

J. C. PATTON,

recalled in behalf of the defendant, and testified as follows:

Direct Examination

The Court: Is this on the issue of damages?

Mr. Anderson: This is on the issue of damages, yes, sir.

3337 By Mr. Newby:

The experience I have had as a cattle man is that I have worked with cattle and around cattle all my life. I have had experience in Indian Territory, Oklahoma, just now, and Texas. In my opinion, the segregation of the Malibu Ranch in the manner proposed by the highway referred to as the main road would damage the ranch as a stock ranch in these
3338 particulars: It divides the pasture. It is a narrow strip anyway, and divides it in many places, and in many places it cuts the pasture from the water at certain seasons of the year, and at some seasons of the year most every point on this road would be a detriment to a stock ranch; it would be used at certain seasons practically every acre for stock. After crops are harvested, we use the fields for pasture, and in the summer seasons we use the moun-
3339 tains. In places this road would divide the summer grass or the late grass from the water places, and stock would have to cross the road to get from their grazing to the water; and in my estimation there would be a great damage in many ways to the ranch as a stock ranch. Beginning at Las Flores Canyon, at the eastern end of the ranch, up to Sweetwater, the building of the road there would separate a small portion of pasture, but the damage would not be so great there as other places. From Sweet-

3340 water to Winter it would divide the field that we use after the harvesting of the crops for stock; the stock would have to go across the road to use the field. The location of these fields to which I have referred and how the road would divide them, is that just east of Malibu Creek we have fields we use usually to plant corn and milo maize or grain, it would divide the field and after crossing the Malibu
3341 Creek it would go through the alfalfa field which is used for calves and poor cows and hogs, which would cause us to have to use both sides of the road. After a quarter of a mile, then for a half a mile it would go through a big alfalfa field which would do damage in the way of cultivating, and be a hindrance in pasturing both portions of the field without the stock crossing the road. There would be a portion of the ranch left on either side of the road.
3342 At that particular portion it would interfere with the cultivation of the field, and that is true at every portion of the ranch where the road crosses through the land that is tillable, and I have heard it estimated and it would be my estimation that it would cost one-third more to cultivate the field after being divided by the road. I believe I have stated all that I desire to state with reference to the condition between Sweetwater and Winter. The watering of cattle would be affected by the road.

3343 Below the road in the summer season it is salty between the road and the ocean, it is usually salty and the cattle when using that part of the country go up the Malibu Creek to where the water is fresh. And the road built at that portion would prevent the cattle going up the creek for the fresh water, unless there was some provision made. From Winter Canyon to Marie, the proposed road goes along the side
3344 of the hill which is used for pasture and cuts off out of probably 60 or 70 acres, it cuts off 3 or 4 acres which would lay south of the road. From Marie to Puerco Canyon the proposed road runs practically about midway through a narrow strip of field possibly not to exceed 300 yards wide, dividing the field and leaving half on either side, or thereabouts. I don't call to mind just the amount of acres in that field. That is cultivated land; and also it would make
3345 a great amount of damage in the way of the stubble, as we have a little narrow strip on either side of the road. The stock would have to go across the road. That would be the easiest way they could get out from one field to the other. It would have practically no effect upon watering the cattle between those two points. The damages to the territory from Puerco to Corral would be practically the same as from Marie to Puerco and from Corral to Sosto; the proposed road from Corral goes through the pas-

3346 ture, leaving a strip of from 200 yards to near half a mile south of the road, and a strip of possibly three-quarters or a mile wide on the north of the road, separating the spring grass—the slope of the land is south of the road, and the road runs along on top of the hi'l just on the bluff. All the south slope is on the south side of the road, or south of the road, which is our early pasture, because it becomes green first; and the stock would have, to get to this
3347 lower part, to cross the road. Consequently they would have to pass back and forward across the road to use both points of the pasture. There is water at all seasons of the year usually in both Corral and Sosto canyons above and below. The proposed road from Sosto to Ramirez divides the pasture almost midway in places. The road leads up Sosto Canyon up the side of the hillside, I should say between a half
3348 and a mile. It follows up Sosto Canyon and up the slope, leading out on the divide in a little dry canyon, leaving a strip of land something like a half to three-quarters of a mile south of the road. It goes over and into Latigo Canyon, up Latigo Canyon, dividing this canyon part and pasture from the water, to a certain extent, in the dry season. In the summer months there would be no water north of the road in this particular canyon. There is springs south of the road, and in the summer season the wild

alfalfa and late feeds are best back in the hills on the north side of the road. Then it leads out into Escondido Canyon and crosses Escondido Canyon and out through on the hillsides and then into the fields near Ramirez Canyon. The water in the Escondido Canyon is usually on the south side, as the other canyons, as stated, in Latigo Canyon, and the principal part of the feeds for the summer months is north of the road in the hills. The building of this proposed road would separate all of the pasture land south from these springs to the north of the road, and the summer pasture, as I call it, is north of the road. There is the fact of stock traveling from the north side to the south side of this proposed road. In many instances, for the reason that the hills are so steep, they always go down a divide. The hillsides are so steep that it is almost impossible for them to get down some of the canyons; and we find in moving stock from place to place they always come down the divide, not down the canyon, and if the proposed road was built through this pasture, if the cattle were forced to go under bridges or through openings left for them, unless it was a gate or something, you would have to force them to go down the canyons and make trails down the rocky bottoms of the canyon to get water. From my observation it is difficult to get cattle to do that. It would

not necessarily require special operatives to see that they did not go down those rocky ways, but it would take a great deal more time to move a bunch of cattle from place to place, as it is difficult to get them to take to the canyons. In rounding up, a man rides to the back side and they holler, and then they will all go down the divide. In order to move a bunch of cattle a man would have to stay with them. It would require more direction, more time and labor. From Ramirez to Walnut the road runs through the field, leaving a strip a quarter of a mile to the north of the road—anywhere from a quarter of a mile to a mile south. At Ramirez Canyon it would affect the stock from going to the lake, also it would divide the pasture from the corral. In Ramirez Canyon we have a bunch of good, substantial corrals or round-up pens and this road leads across above it. In order to get the cattle in the corrals we would have to get them through gates or over bridges, which would be very difficult as we have a pasture a half mile wide now leading into the corrals. The portion going through the fields would make it more difficult to cultivate that particular land. From Walnut to Zuma is practically about the same as from Ramirez to Walnut; it is right through the fields, leading down near Zuma Ranch, it crosses the alfalfa, and the irrigating system and the Zuma field. There is water

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3355 in Walnut Canyon. I believe where the survey runs it would take out some watering troughs. We have some troughs fixed up with leak pipes. The proposed road does not separate any pasture land from the springs from which we get the water, only in the summer season. The springs are in the pasture above the road. In the dry season, south of the road, it would be dry. Last year it was dry all the way from
3356 where the road crosses Walnut, it was dry, but there was springs on the north side. If the cattle were on the other side of the road in the summer season, in order to get to the springs they would have to cross the road. It would be the same interference with I have testified to at other portions. From Ramirez to Zuma there are barrancas that the road crosses, I believe, no pasturage there, only in the field. The road stays in the field all the way from Ramirez
3357 to Zuma with the exception of what goes down the hill at Zuma camp. It goes through the horse pasture there. From Zuma to Hog Flat the proposed road leads out from Zuma Canyon through the alfalfa field to about possibly a quarter of a mile, and then leads through some hillside land up on top of the hill, into the farm land, and stays along close to the ocean bluff, in the field, over to Hog Flats. The proposed road has no effect on the watering there, with regard to the watering of stock, with the exception that

as stated before, whenever they were in the fields they would have to cross the road to get from the fields to the Zuma Lake. It damages the irrigating system, too. The railroad crosses Zuma lake; part of it is north of the right of way; nearly all of that lake is north of the right of way; in distance, it is about half way; it extends up to the north quite a ways. That fluctuates according to the amount of rain. In the spring season it is not as big as in the summer.

Taking the territory from Hog Flat to Trancas, the proposed road runs along at the foothills on the beach, most of the time staying in the field, and there is pasture land below the foothills that is not cultivated, and the stock in pasturing in the fields, use that bluff for a wind break, and the picking of dry grass in the winter season when they are turned out. It would affect the cattle going from the fields, and across these foothills. They would have to cross the road either way. The pasture land at that point lies between the railroad right of way and the proposed highway. With reference to the watering of stock at that particular point, the proposed highway has no effect, I believe. They have a windmill at Trancas, but that is on the north side of the highway. From Trancas to Steep Hill, the proposed highway in that strip stays under the bluff I was speak-

3361 ing of, and then comes up the same place our road does. From Steep Hill to Encinal the road runs midway through the field. Its effect upon stock crossing is the same as other places; they would have to cross the road in different ways going and coming. At Encinal there is water on both sides of the road. Usually the water runs in Encinal all the year around. From Encinal to Lachusa it goes through the fields,
3362 several fields, some four or five fields. The fields are about halfway between the foothills and the beach. It divides those fields. There is pasturage on either side of the proposed highway. There is water in the canyon we call Bridge Canyon, each of Lachusa. The proposed highway affects that water as it crosses just above where the springs are, and cattle, to get to the water, would have to cross the proposed highway, and water right near the highway.
3363 The effect of the highway being close by is that if there was much travel on the highway, you could not get cattle to come to that place for water, as they are afraid of automobiles and they won't stay around a public thoroughfare very much. There are barrancas in that territory uncultivated, that is used for pasturage. It is uncultivated land on both sides, above and below the proposed highway. There are uncultivated fields there. There are also cultivated fields in that territory. The cultivated fields

3364 are used for pasturage after the crop is taken off, and the uncultivated fields, we use them for pasture, too. We use fields for pasture for winter, as we find it more valuable to have places left that have got long, dry grass for winter pasture, so we use them for winter pasture. From Lachusa to Little Aliso the road goes just about the edge and possibly in to the edge of the alfalfa. The stakes are practically
3365 on the north edge of the alfalfa field. The alfalfa field is south of the proposed highway, mostly. We are using it at present for hogs, and we very often put poor cows in, at different seasons of the year. North of the road is used for pasture. In the winter time, at this particular point, that is used for pasture both north and south of the road. At these particular points, there is water both north and south of the road at all seasons of the year.
3366 There is a reservoir there, a watering system; that is east of Lachusa. That is between Lachusa and Encinal. The road comes between the reservoir and the alfalfa fields. The stock at this point between Lachusa and Little Aliso get their water from the reservoir system or from the Aliso or the Lachusa. The proposed road separates the pasturage so as to interfere with the cattle watering at that particular point it would interfere with our present watering places, because the present watering places

are south of where the proposed road crosses. So it would be necessary to provide other means of watering on the other side of the road if this proposed highway is built.

From Little Alisos to Nicolas the proposed road runs through fields, a strip of fields about a quarter of a mile wide. The road runs, as best I remember, something like midway of the center of it. There are fields practically all the way from Little Aliso to Nicolas; pasturage on both sides of the road, and used as such. There is a spring north of the proposed road about halfway between Nicolas and Little Aliso, and there is water in Nicolas the year around. Assuming that the cattle were pasturing on the south of the road, they would have to cross the road if they went up to this spring, and at all seasons of the year there is green grass around the spring; that is on the hillside between Nicolas and Little Aliso. The proposed highway would separate the stock from this spring; the stock that was using the field. The only other fact at this particular point that enters into my estimate as to damages is that it separates the fields and the foothills because, as I stated before, where our winter pasture lays is in the stubble fields, whether it be bean or barley or what kind of stubble fields. The stock usually goes on the hillsides to graze and to lay and rest on the hillsides. The cattle

3370 feeding in the bean fields necessarily require some grass or hay in addition to the beans, and they go into the fields and eat bean straw or beans, which acts to a certain extent as grain for a horse. They get their drink and graze on the grass a while as hay. They go up on the hillsides and get grass after grazing on the bean straw. I don't think that bean straw alone or beans alone would be very good for animals unless they got some hay with it;
3371 that would be required daily in order to provide proper food for cattle. I have observed that the cattle have done that. These bean lands I mention, some of portions of those lands are on either side of the road. The same conditions I have just described with reference to the feeding of the cattle and water were observed at all portions on the ranch where the proposed highway went through cultivated fields. The
3372 cattle would feed on the stubble and waste beans and on the barrancas and hillsides, which was a daily occurrence; they must have this hay or dry grass; they will pick all of that dry grass. Since the harvesting of the bean crop this year and right now, the cattle are doing that. From Nicolas to Arroyo Sequit the proposed road goes along the foothills, from the bluff near the beach to the foothills, maybe 200 yards or three-quarters of a mile wide. The first half mile it goes about half way through

a bean field or cultivated land, and the next half mile is barrancas and pasture land and then it goes into another field, and for a quarter of a mile, and then on to the Sequit. There is pasture land on either side of the road; just about the same condition exists in this place as between Encinal and Lachusa. With reference to water at that point, the proposed highway separates the springs; the springs and watering trough would be just north of the proposed road in what is called the Willow camp; the canyons are so steep that we would have to have some provision for them to get to the water; at the present time it is inaccessible. From Arroyo Sequit to the Ventura county line, the first half mile or possibly three-quarters mile it goes through a field and then down under the bluff on the beach, staying along close to the bluff, and coming up about the Ventura county line into that field again. The pasture is practically all on the north side with the exception of where it goes through the field. The distance through the field is about half a mile. At that particular point I would judge it would leave possibly 40 or 50 acres south of the road, and the balance north. With reference to the water system there, the water is practically all north of the road. I stated that the building of the proposed road would add to the cost of cultivation; that is true with

reference to every part of the ranch where the proposed road goes through the cultivated land, and more so in the small fields, because it takes up so much time in turning and plowing and cultivating. A man can not plow as many acres per day when he has to make such short turns. In cultivating crops there is what is called a turn row, when you come up to a fence, usually there is not much stuff for 10 or 12 feet from the fence, where the team turns; there is that much waste space. It is usually planted but very little stuff grows there on account of the team turning around. I have described the difficulty of carrying the cattle across the public highway. That increases the cost of the management of the ranch to have it divided. My estimation is that if this proposed road were built it would increase the cost of caring for the stock half or two-thirds more than the present expenses. We would have more fence to look after and more changes of the stock, the pasture would be smaller, we would have to move them from place to place and they would have to be watched more. It would take more men and consequently it would take more men all around to handle them. It would require more horses for the men to ride. The men draw wages and they have to be fed and the horses have to be taken care of. Since I have been on

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3379 the Malibu Ranch, I have not kept account of the cost of cultivating these various fields through which the proposed highway runs, so that I could give it into particular fields. We would have to use an estimate on different fields, as I never kept separate account of the different fields. I have not kept account of the cultivation separate and apart from other accounts, only the occasions where I wanted to
3380 find out how much it was costing to cultivate, or how much it was costing to plow. I can tell how much it costs to plow a certain piece of ground, but probably on that piece of ground I did not keep account of the seeding. I have kept separate accounts of the cost of looking after the stock, the supervision of the stock; I know just about, and I could get the information from the office, as my reports show just what every man is doing and the bookkeeper
3381 can take up any subject and tell just what it costs.

Mr. Anderson: With one slight matter, with Mr. Patton, we may want to ask him about later, I think that is all at this time.

The Court: You may recall him for that.

Mr. Anderson: It is simply a matter of the acreage of certain land.

Cross-Examination

By Mr. Burnell:

Cattle usually find their way to water without the aid of anybody to lead them or drive

3382 them, where there is water in the general vicinity.

Q. Now, supposing that the proposed road that is to be built was built with a fence on both sides, and assuming there are bridges or culverts where the road crosses the various canyons which intersect the ranch, and assuming that there was a clearance of not less than 10 feet under each of those bridges or culverts, it would be sufficient clearance for the cattle
3383 to make their way under it, wouldn't it? A. Well, in answer to the question I would say it would be possible but not practical, as it would take some time for cattle to make trails under the bridges and in several instances, knowing where the road lays and the canyons, it would be impossible for the cattle to get down to the bridges. They would have to come down a steep mountain.

3384 On one side of Sosto Canyon, the cattle coming from the south, all the way from where it crosses the canyon to where it goes over the divide, it would be impossible for a man to ride a horse down there. Cattle will make trails for themselves down a hillside almost too steep for a man to ride a horse, but going the other way it is hard for poor cows to climb the hills, sometimes it takes them an hour to get up a hill. It is practically a mile from Sosto to the next canyon up and down which the cows

could get. The next canyon to the south is about a quarter of a mile from Sosto to Latigo. The water at Sosto is east of the proposed road. At Sosto Canyon, the roads run practically north, up Sosto Canyon, so that the cattle would have to cross the road to get water; if they didn't cross it at Sosto they would have to go one mile north to Escondido, or a mile south. They would have to cross a steep mountain, over to Latigo Canyon, which is almost impossible for stock or men to get over. It is a fact that where a road or field is fenced that cattle will usually make their way around the fence until they find a place to get through; but sometimes a fence will cause them to travel a mile when they could get water in a quarter of a mile. I am not able to estimate in dollars and cents the additional expense which would be caused to the owners of the ranch from the fact that the cattle would have to travel further to water than they do now. But you take a ranch with a thousand or 1500 head of cattle and where it affects all the cattle, it makes quite a damage in fattening, or raising your cattle for market. If you want to put a bunch to fatten, your grass may be good, but if they have got to go a mile to water, they will gain flesh very slow. In lots of cases the seasons are short, and you will not get them ready. The main thing is plenty of water, and the

feed doesn't amount to so much. Along most of the extent of the proposed road, the water is on the south side in the dry season. That is at the time of year when the streams and canyons dry up, then the water is on the ocean side. The springs are on the lower side; usually there is a lake on the lower side of the canyon. The Malibu Creek, for instance, and Sosto Canyon and Ramirez Canyon, Zuma Canyon and Trancas Canyon, all of them have lakes where there is water that goes under the ground. Going along in a westerly direction up the coast from Las Flores Canyon, the first water to be found, the principal water for cattle, is at Sweetwater Canyon, about a half mile east of Malibu Creek, right at the warehouse. At Sweetwater Canyon there is not water on both sides of the road; there is practically none at the south side. There is a spring that covers possibly 50 yards long that there is water at all times of the year, but the right of way of this proposed road would come just about where the water comes out, just to the south of the water holes. At Sweetwater Canyon the road would not prevent the cattle pasturing on the north side of the road or from any water which they could get on the south side. The next place where there is water for cattle on the ocean side of the road is Malibu Creek, where there is a lake, that there is water on either side of the proposed road, at all times.

That is on both sides of the road. The proposed road there would not keep the cattle from any water they wanted to get. The next point where the water is on the south side of the road is at Marie Canyon. That goes dry in the summer season. In the dry season it would not keep the cattle from any water on the south side which they could get in the summer. There is water up the canyon. There is another case that the springs are right close to where the road comes. I couldn't state whether it is on the upper side or lower side. I don't know, as a matter of fact, whether the road at Marie Canyon would prevent the cattle getting water near where the road is now. The everlasting spring is—in wet seasons there is water running in the canyon, but in the dry seasons there is springs that is right near the right of way. There is no water running in Marie Canyon during the dry months. At all times of the year there is water on both sides of the road where it crosses Marie Canyon or in that vicinity. The next place going west where there is water on the south side is Puerco. That is the next canyon beyond Marie; the canyon is entirely dry in dry seasons. At Puerco the proposed road would not prevent the cattle from getting any water which they now could get south of the location of the road. At present our fences are on either side of Puerco and

3394 Marie Canyon, so cattle can have full access all the year around to the entire canyon. We get water for cattle next west of that point at Corral Canyon. There is a lake on the south side of the road. That lake is wet all the year around; that is the water that the cattle drink. There is water at the north of the proposed road also at certain seasons—I believe last year it was dry. That is not a usual circumstance; but in dry seasons it forces the cattle to come
3395 down to this lake on the south side. Continuing west from Corral, we next find water south of the road at Sosto Canyon; that is, running water, spring water, running streams. The water in that canyon flows all the year both above and below, that is, north and south of the proposed road. It would be almost impossible for cattle to come down to Sosto Canyon from the west; we call it south of the road.
3396 Irrespective of the proposed road, the same physical condition would apply to the cattle coming down Sosto Canyon from the south part. There is a big mountain, a steep bluff, and it is almost impossible for cattle to come down. If this proposed road goes through with the fence, it would almost keep the cattle from coming off of that mesa and mountain down to Sosto Canyon. This is Sosto Canyon and this is the mountain here (indicating on map, Exhibit 6). The mesa is here and the road comes

3397 along here. It would be west of this road that there is a big, high mountain.

Mr. Burnell: The witness indicates, Mr. Anderson, a location on the map to the west and south of the proposed road where it makes rather an abrupt turn to the north at the point marked on the map with red pencil "Solstice Canyon."

Mr. Anderson: As indicated, indicating the bluff he refers to, or mountain, rather.

3398 Mr. Burnell: Yes. That would prevent cattle coming from the south.

A. From the south. As we understand the questions, all between the road and the beach is called south. As to the character of the land just west of this bluff or mountain, it is approached by a divide or backbone, as we call it, between Latigo Canyon and Sosto Canyon, or a branch of the Sosto Canyon that the

3399 proposed road leads up. The character of Latigo Canyon in regard to being a feasible place for cattle is that it is very, very steep. The branch banks are steeper than Solstice. There is good pasture land down to the branch of the bluff, but the Sosto or Latigo bluffs are very steep. At the present time when we have cattle pastured on that part of the ranch which lies to the north of the proposed road, those cattle to come down to the water on the south side of the proposed road at Sosto Canyon,

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3400 go up a trail that we use now that leads right up to the survey of this proposed county road, leading up the side of the Dry Canyon. The cattle from Sosto Canyon, most of them, go up this road to get up on this mesa or these hills, which trail is right in the right of way of that survey. That is where the trail was started. The cattle, judging from my experience, would make their own trail, if the mountain is not
3401 too steep, but it is hard to get cattle to make a trail up a mountain. If they were up there and the trail was closed, they would get to water; they would go after water; it might cause them to go a mile further is all. It is a common thing for cattle to be pastured where they would have to go a number of miles to water, for range stock; but for beef stock, you have to have them close to water to have any success in getting them fat and ready for mar-
3402 ket. We fatten in the region of Sosto Canyon, in the spring, but not at the present time. Now they are range cattle. Continuing west from Sosto, we next find water south of the proposed road at Latigo Canyon. The source of the water there is some small springs in a deep canyon, south of the proposed road. Where the proposed road crosses Latigo, it is not very steep. The road crosses in a flat, or Latigo Canyon, where it would be impossible to put a bridge unless you made a fill. Going west, you

3403 come into Escondido Canyon. You find water there, but the road runs up Escondido something like a half a mile, right at the edge of the bluff, keeping the cattle from coming down to the water from the south. Cattle, along on that divide between Latigo and Escondido, we have to go west to get water out of Escondido Canyon, south of the road, you would have to follow the fence over half a mile from where
3404 you come down and the cattle would have to go a half a mile up and a half a mile back. That would be a mile a day, where, if it was not for the road they could get to water in a couple of hundred yards. I think that that extra travel would materially affect the condition of the cattle. They get enough exercise getting their feed, but take poor cattle, when they have to make a mile extra travel every day, when a cow wants a drink she starts for water. We haven't
3405 any poor cattle on the Rindge Ranch at the present time, but I have seen them poor, though. As a rule we don't have poor cattle. We have succeeded in keeping pretty good cattle.

Q. Then when you eliminate the poor cattle, which you say you don't have, and taking only the good cattle, do you think that this sort of animals would be injured by this little trip of a half a mile to water.

Mr. Anderson: It is a half a mile up and a half a mile back, which is a mile and the round trip would make it a two-mile trip.

3406 A. It is a good way to make cattle poor.

Half a mile up and three-quarters of a mile back they would have to go; that would be a mile and a quarter altogether. I think that that would injure the cattle, keep them from feeding, and it adds to the taking off of the flesh that they are putting on, and takes up their time. Part of the pasture at the present time is on the ocean side of the road. The cattle there would not have to do all this traveling; but our late
3407 summer pasture is on the north side of the road in the foothills, where the wild alfalfa and the bunch grass is. Those cattle would have to travel a mile and a quarter to get water. The next water south of the proposed road is at Ramirez Canyon, an underground lake, the water comes up near the ocean. That is a lake all the year round—water there, no. There is no water north of the proposed road at that
3408 point only piped water in the dry season. That is good water for cattle. When the pipe is connected, there would be water north and south of the road. At Ramirez Canyon the proposed road cuts us away from the corrals and the round-up pens.

Assuming that the bridge has a 17-foot clearance and the width corresponding to the width of the canyon, I would think, for the width of the canyon, 17 feet would be good enough, so that there would not be anything to prevent the

3409 cattle going back and forth, as the canyon is sufficient to let all the water pass down the canyon. I understand that the 17 feet is from the bottom of the canyon to the bottom of the bridge. Assuming the bridge to be as stated, the only thing to prevent the cattle from passing through there would be the rocky bottom. Cattle go over rocky hills north of the proposed road; but if the cattle had to pass over the creek bed, they get sore-footed. In the hills they are care-
3410 ful where they put their feet.

Again, assuming the height of the bridge to be 17 feet and the width three 38-foot bends, I would not regard the matters previously testified to be affected by the change. It would make a much better opening for moving cattle than what we supposed.

With a bridge of the sort at Ramirez, there would be nothing to prevent the cattle passing
3411 back and forth of their own will. There would be an interference in moving herds of 500 or 1000. The largest number of cattle we have on the ranch at the present time is 1050. I think there has been something over 1700 head there, which is the largest number we have had on the ranch at any time in the last three years. At the branding time, we bring everything in at the spring and fall branding of the calves. Then everything is put into one bunch and they are kept at Ramirez Canyon. For the purpose

3412 of the round-up it would be necessary to drive the cattle through or under the bridge where the road crosses Ramirez Canyon, to get them to these corrals. This canyon happens to be so that they can travel all over the banks. There would be difficulty for an experienced cow man, or one or two cow men, in driving these cattle through and under that bridge. It would take a long time to get them all to go through this
3413 small space. As it is, we start them down the canyon, as I stated before, and the cattle go of their own accord from one bank of the canyon to the other, which is probably a quarter of a mile, towards the corrals. It would take us three or four hours longer to bunch all the cattle that we have ever had on the ranch, 1700 cattle, and to drive those 1700 cattle to the branding or round-up place by driving them under the bridge at the canyon. That is twice a year. We
3414 brand twice a year. At the present time, and by the present time I mean the last two or three years, when we have our round-ups, we collect the cattle, for instance, up at the western end of the ranch, Nicolas Canyon and Arroyo Sequit, and Trancas, and all those other canyons and bring them down to a round-up point at Ramirez Canyon. We get them down to Ramirez Canyon from Trancas and Arroyo Sequit and Lachusa Canyon, if there is crops growing in the fields, we bring them on the beach at

all places possible; otherwise we have to take them up in the canyons and around to get around the fields. There is nothing in the proposed road or proposed crossing at Ramirez Canyon that I have spoken of, that would prevent us bringing the cattle along the beach as we have in the past. Only we bring the cattle and hold them in a pasture just north of the proposed road. There is a small pasture that for two or three days we put cattle in the pasture. So that if we bring them down the road we would have to take them up north of the road to get them in the pasture. We are still talking of cattle to the west of the ranch. When we bring them down to the round-up at Ramirez Canyon we do not follow the beach around Point Dume. If there is fields at the Point, we take them up Zuma Canyon, and across the pasture north of the fields, and that pasture leads right into Ramirez pasture. Then we could still do that without crossing the proposed road at the Ramirez Canyon; take them along and put them into the corrals. It is a fact that the bringing of the cattle to the round-up point—we would bring them down the road as it is at the present time—as it exists on the ranch at the present time, if the fields would permit; if the crops are harvested, we bring them down the road. The road leads through fields, and in moving cattle from the upper end, you speak of this proposed

county road there, we would have to cross that road four or five times, bringing them from the upper end, unless we would bring them down the public highway. There is nothing to prevent bringing them down the public highway, except that it is very dangerous to bring them down among machines and the like. That would depend on whether there was very much travel on it. Still speaking of the round-up time, we get the cattle from Malibu Canyon and Corral and Marie and Carbon Canyon and the other canyons lying east of Ramirez by taking them through the mountains. Occasionally we take them along the beach; when we want to drive a bunch through we drive them right down the beach. That is quicker than through the mountains. When we are rounding up, we start at the east and get everything in the mountains and drive them west. Figuring the value of time, we would possibly save eight hours by bringing them through the mountains along the beach. If we are bringing them from the Malibu to town, we take them down the beach; but if we are gathering cattle that are collected around in the mountains we keep drifting them west until we come to Ramirez Canyon. In bringing them from the ranch to Ramirez Canyon, we would have to get them from both sides of the proposed highway. There would be nothing to prevent us from getting them from

3421 both sides and taking them down along the beach, except that all the cattle gathered on the south side, we would have to take them across the highway because the highway comes out of Escondido Canyon and enters into the fields east of Ramirez Canyon, so that they would have to cross the highway. We possibly could bring them right down the highway, but you would have to bring them in from both ways. In that
3422 case, there would have to be outlets made at Ramirez Canyon to get them out. In other words, gates in the fence along the highway. At the present time the road that actually exists and is traveled on the Rindge Ranch is not that road fenced on both sides at Las Flores Canyon and Ramirez Canyon. The parts that are fenced are on Malibu Flat and the alfalfa fields; there are places fenced on both sides; possibly half a mile. When we come to Zuma Canyon, shown on
3423 the map as Dume Canyon, we find water south of the location of the proposed road, the lake. That portion of Zuma Canyon where the proposed highway crosses is a valley of alfalfa.

Assuming that there is a 160-foot pile trestle bridge with a clearance of 9 feet, I would say where the trestle crosses the canyon that one side is precipitous and the other is not. Nothing to prevent cattle going up and down, with the exception that it is very rough on the bottom of the canyon, but that rocky condition would be

3424 obviated by taking up the rocks. They are small rocks. They could be shoveled out of the way.

At the next canyon to the west, Trancas, there is the water south of the road, a lake, fresh and salt both, when the high tides get up into it. On the north side of the railroad, we have a windmill and a well. That windmill and well is north of the proposed road, and produces water at all seasons of the year. There
3425 are three canyons between Trancas and Lachusa. Encinal Canyon is the next one with water. There is something at that canyon which would prevent the cattle from going under the bridge proposed there; it is very steep, with a deep gulch under it where the road crosses it. The bottom of that gulch is rocky. There is some big boulders there, and the walls are very, very steep. The judge and jury may remember passing a new bridge. It is very steep on either
3426 side. The steep walls on that canyon are not towards the ocean; just below where the road crosses, probably 50 yards it slopes off. The location of the proposed road at that point, relative to the present road, is right near it, about 30 feet north of it. The same conditions obtain at the point where the present road crosses that canyon as where the proposed road crosses; there are steep banks. At the present time the old road is not fenced. The cattle go up or down the canyon. If they were forced

3427 to go from one field to another and be forced to come under a bridge, it would be almost impossible to put them through. You would have to make roads for them to get down into that canyon. I know approximately the expense of making a trail or road sufficient for the cattle to pass down under the bridge; probably five days for one man to dig out a place sufficient for them to go under at $3.50 per day and board,
3428 and then the cattle would be able to pass back and forth under the proposed road. It would not be as convenient as to let them pass at will. It is just a matter of convenience, even after it was fixed.

The next canyon just east of Lachusa is what I call the Bridge Canyon. The nature of that canyon at the point where the proposed road crosses is very steep. It crosses pretty near the same place the present road crosses. The
3429 conditions we would have in respect to the crossing under the proposed bridge across Lachusa Canyon would not be the same conditions that we have at the present time in regard to that road. If the cattle were forced to go down under it, you have got no coming out place. The road is not fenced at the present time. There is no water at the south side of the road at Bridge Canyon. It is all north. There is nothing at Los Alisos Canyon to prevent the cattle going under the bridge; they can pass

3430 under the bridge; there is water on both sides of the road. Lachusa Canyon, it is impossible for stock to pass up it; it is so steep it is impossible for stock to get down in or out of it. The banks are steep to that extent, something like 150 yards; then they are less steep, it slopes to one side. It has been impossible for stock to pass under the present bridge.

Assuming that the bridge dimensions, that the county proposes to put there, is of sufficient
3431 height, that they would be able to pass under it, it would be a bridge with a clearance of 21 feet. I am talking about Los Alisos. There is nothing to prevent the cattle from going under the bridge. I think they could pass it all right.

There is no point where the proposed road crosses Nicolas Canyon that the cattle could not pass; it goes dry below the road in dry seasons. The sides of Sequit Canyon are not steep below
3433 the proposed road. Sequit Canyon where the proposed road crosses is practically level, there is very little banks to it at all. The principal detriment to the ranch in my opinion is the fact that it is divided in two from north and south, by the proposed road which traverses it, and the additional expense. The present road, the one that the court and jury went over, now divides the ranch from east to west, but it is not fenced; the stock runs across the road. It is a private road and nobody travels over it but

3433 the people on the ranch, so it is not necessary to fence it. They close the gates and help care for the stock. Automobiles traverse it.

We plant beans on the ranch in May or June. They are cut the latter part of the July or first of August. During that time we do not allow cattle in on the bean fields. After the beans are cut, the cattle are turned in, the beans are taken away and the straw hauled in for feed, or left in the field for feed, and the cattle are turned in.
3434 We thresh in August; this year it was later, but they are supposed to be threshing in August or September. We don't let the cattle in until we finish the threshing. That takes us up to August. We let the cattle in for sixty or ninety days after threshing. It depends; 60 days is the contract with the bean growers, longer if necessary. We could keep them in there ninety days. The amount of feed determines the neces-
3435 sity. This year they are in the field now (November 26, 1918) and will be for thirty days more. We do fall plowing. The bean fields are leased. I have nothing to do with that. The bean fields are plowed in October, November and December,—November and December is the usual time. During the time that the plowing is going on the cattle are allowed in the bean field to graze the barrancas and hills that is included in the fields. Sometime some years when we get to plowing there is beans left in the fields.

3436 There is a good deal of foothills that is included in the fields. At the present time, above the Trancas the fields and mountains all run into one, and we cannot pasture when the bean crops are in, so that leaves lots of dry feed in the hills to be pastured for winter pasture while we are pasturing the fields. There is some land that is used for the raising of beans that is not fenced off from the pasture land. That condition ob-
3437 tains south of the proposed road. The railroad line or track that runs through the ranch does not interfere with the cattle to any great extent. They run through one pasture or field. Of late there have been no cars running on the track to interfere with the stock, but where there are cars running it would interfere with cattle grazing at certain parts. There is only about a mile of it goes through the fields.

Redirect Examination

3438 By Mr. Newby:

The railroad right of way goes through only one field for a distance of about a mile and a half, I judge. The railroad right of way is not fenced either. With the exception of this field that I have mentioned, it runs through the extreme southerly portion of the ranch. Approximately the acreage south of the railroad right of way is, I judge, something like 200 or 225 acres of cultivated land, and some 50 or 60 acres of the point. Indicating the cultivated land south

of the railroad right of way on Defendant's Exhibit 6. It comes across from Corral Canyon and comes across and comes almost down to the Point here (indicating). Say from a Corral Canyon to a point about a quarter of a mile west of the extreme point and then goes down to the beach again. The land I refer to is the land south of that place, south and east. Probably something over 200 acres; probably 225 acres up here and here, and this point is sand (indicating). That is not in cultivation. There are some 40 or 50 acres there. That is in Ramirez Canyon, on the point. It comes out in the field at Ramirez Canyon. Tracing approximately upon the map, this is the mouth of Ramirez Canyon. It comes right out of the mouth of Ramirez Canyon, almost west, and it bears off across here and comes close to the point down here (indicating) and keeps across here about like that (indicating). I have used a black pencil and marked that line with the letters "R. R." —that would indicate the railroad line. We have marked the black line with the letters "R. R.", indicating the approximate place where the right of way goes across Point Dume, and south and east of that line is cultivated land of approximately 225 acres, and uncultivated land 50 or 60 acres. This is from Ramirez Canyon to the bluff. This is all in cultivation, and this is sand and is not in cultivation right at the

3442 extreme point (indicating); the latter part being the extreme southwest corner of the point. With reference to the plowing on the Malibu Ranch, I said the time of the plowing of the bean field depended on the amount of feed on the land after the harvest, and under the particular contract that I have reference to, the period is 60 days after harvesting, with the privilege of a longer period if the company thinks it necessary,
3443 so that there is an absolute period of sixty days after harvesting for grazing purposes on the bean land.

I say that the present road is not fenced. The general public does not go over that road; there are gates across the eastern end of it which are kept locked. There is no one allowed in there without a permit. At Bridge Canyon I don't think there is any water on the south. There is none at dry season. It is just a spring. I
3444 think the proposed road crosses right where the springs are. That would have the effect of destroying that as a watering place. If there was a bridge there stock would not go there to drink under the bridge anyway.

Q. You have been asked frequently upon cross-examination if it was possible for cattle to be passed under the respective bridges the sizes of which have been described. I will ask you if the difficulty of passing cattle under the

3445 bridges is in passing them under or gathering them.

A. I would say in bringing a herd of cattle under the bridges they are naturally afraid and they are hard to get started. In case you had a bunch there, going into the corral, you get them started under the bridge and an automobile comes over the bridge, it is goodbye cattle. They are gone everywhere. Let a machine go
3446 over them and you could not get enough men to hold them, with the possibility of a stampede. That is a matter of common knowledge. If they get scared at that bridge once you cannot get them under it again. The effect those bridges and the road have upon cattle that ordinarily go from pasture to water, of their own volition, without being herded, is if there isn't a bunch of them they will whirl around and look, and don't get so frightened. They will
3447 pass back and forth after they have the trail made and get accustomed to going along there. They have to form these new habits. So far as the cattle being fattened for the market, exercise is not very good for them. You can not fatten beef and keep them traveling. That is what I meant by saying it would have a bad effect on the cattle, on these cattle or any cattle. I contend that if they have to walk a mile after water, they will walk off just that much flesh and at certain seasons when the grass is short,

3448 they are pretty busy trying to get enough to eat, and if they had to climb the mountains after water, they never will get fat. We never move poor cattle. If the feed is getting short we don't move them, because they always lose flesh and when you move them you are apt to lose some of the cattle. As to horses and mules passing under the bridge, they are very shy; when they get under there they usually run through. It
3449 would have the same effect if you put a bunch of young horses into the corral and a machine or a wagon went over the bridge, they will get away.

J. C. PATTON,

recalled on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Newby:

I have gone over the Malibu Ranch carefully
3450 for the purpose of estimating the various kinds of land on the ranch, that is, the pasture land and the tillable land, and the other kind.

Q. Please tell us in acreage the various types of land upon the Malibu Ranch, dividing it, if you may, as to the part on the May K. Rindge portion and that on the Rindge Company portion.

A. You wish the acreage or approximate acreage of pasture and acreage of cultivation and acreage subject to cultivation?

3451 Q. Yes; and the character of the cultivation, if you know.

A. I have a little memorandum of the different pieces and what grows on it. I made that memorandum myself, after a careful investigation of the matter.

I will begin at Las Flores Canyon and go west and give in detail approximately the amount of acres in pasture and what grows on this. I have
3452 made arrangements here for three different things in each acreage of different grasses that grows—different feed that grows,—for stock. I have divided it between the canyons, and also what grows on the different crops, on the different fields. We will say from Sweetwater to Las Flores, 900 acres of pasture, description open hills, wild oats, clover, carissa grass, big bunch grass which grows on that portion of the pasture. We find in the length of the ranch dif-
3453 ferent sections of the ranch growing different feed and for that reason I have made this provision for the different locations on the ranch. There is no land in cultivation at the present time from Las Flores to Sweetwater Canyon. From Sweetwater to Malibu creek there is about 300 acres of pasture land, description mountainous. Wild alfalfa, acorns and carissa grass. There is 12 acres in cultivation in walnuts, lemons and alfalfa. East of Malibu Creek, 50 acres on the mesa of barley land. Grain, milo

3454 maize. That is east of Malibu Creek. From Malibu Creek to Marie Canyon pasture 460 acres, mountain and mesa, hills and open flats on the hills. Wild alfalfa, wild oats and bunch grass. From Malibu Creek alfalfa, corn and potatoes 55 acres. Beans 80 acres. On the mesa, beans and milo maize 100 acres. That is up to Marie Canyon. I have 1957 acres of Mr. and Mrs. Rindge. That is up to the western boundary of Mrs. Rindge's land. From Marie
3455 Canyon to Corral Canyon, 500 acres of pasture land, open hills, burr clover, wild oats and wild alfalfa. 180 acres table land in beans. From Corral to Sosto Canyon 600 acres open hills and burr clover. The cultivated land between the two last canyons is about 180 acres. Corral to Sosto Canyon open hills, burr clover, wild oats, wild alfalfa. Very good pasture. No cultivated land. From Sosto to Escondido Canyon,
3456 740 acres, hills, wild alfalfa and acorns and wild oats. From Latigo Canyon, the cultivated land that starts there is 100 acres. This is from Sosto to Escondido. No land in cultivation excepting 100 acres. East of Escondido to Ramirez there is 250 acres in cultivation in beans. From Escondido to Zuma, 1500 acres pasture, open hills. Burr clover and alfalfa and wild alfalfa and various pasture. Heavy black soil. Open prairie, hills. 250 acres of cultivated land, Escondido to Ramirez in beans. It

3457 includes everything up to Ramirez Canyon, from Ramirez to Zuma Canyon 700 acres in cultivation, rolling hills, oats and barley and milo maize. In Zuma Canyon 40 acres alfalfa, in addition to the 700. That is east of Zuma Canyon. West of Zuma Canyon there is about 30 acres in alfalfa. That makes in that neighborhood between those points about 700 acres. From Zuma to Las Trancas Canyon 600 acres in hills and pasture; 600 pasture. It is a hilly, sloping
3458 country, from the top of the divide sloping toward the ocean. Wild alfalfa and burr clover. 400 acres of cultivated land in beans and barley at Las Trancas Canyon. From Las Trancas to Encinal Canyon, 500 acres in pasture, hills and table, wild oats, wild alfalfa and bunch grass. 150 acres of table land in beans and 85 acres of table land and beans up to Bridge Canyon. From Encinal to Lachusa 800 acres in pasture,
3459 open hills, wild oats, burr clover and alfilaria. This 85 acres is included from the Encinal to the Bridge Canyon. From Bridge Canyon to Little Lisos, 50 acres of alfalfa. Bridge Canyon is the little canyon just west of the alfalfa patch at Lachusa. From Lachusa to Latigo 450 acres of pasture. To Latigo, Little Alisos, it is known; 450 acres high ridge alfalfa. No cultivated land there with the exception of the 50 acres included in the alfalfa, which I have already mentioned. From Latigo to Sheep Canyon

3460 there is 195 acres in cultivation, slope land, beans. That is the first canyon west of the Nicolas Canyon. West of this there is new land that has been put in cultivation since the case started. I did not give the pasture land there from Lachusa to Sheep Canyon. I have the pasture all included from the Latigo or from Little Alisos to the county line. 3500 acres open hills, wild oats, burr clover and carissa. From Sheep
3461 Canyon to the county line there is 60 acres in cultivation. My total summary of the ranch is 10,650 acres of pasture land and 2630 acres of farm land, land in cultivation. I wish to say that my figures may be off a little. I had nothing only my own experiences in handling this ground and covering this ground and measuring up the field lands. I made these figures absolutely of my own accord.

The lemon orchard is at Malibu camp; right
3462 near Malibu camp. In the farm land, amounting to 2,630 acres, I have included all of the land on the entire ranch that is in cultivation, irrespective of whether it is in orchard, hay or beans, with the exception of the lands that is up near the Ventura county line that has been put in this winter, in the last month or two, something like 60 or 70 acres and it will amount to about a hundred acres when they are through in that portion of the ranch, in the Sequit Canyon, in the extreme western portion of the

3463 ranch. I do not know accurately how many acres in there is in alfalfa, something like 70 or 80 acres I presume, something over 50 acres at Malibu and 50 acres at Lachusa, about 175 acres altogether.

Cross-Examination

By Mr. Burnell:

The amount that has been changed from strictly pasture land to cultivated land since
3464 November, 1917, is about 130 acres or 150 acres. The tendency has been to withdraw the land from what is called the pasture column and put it into the cultivated column. Of this land that has been taken from pasture and put into cultivation there is something like 50 acres in Winter Canyon put in this last winter. That makes an additional amount to a little field in Winter Canyon. There was an additional amount up near the Trancas Canyon, Encinal,
3465 between Trancas and Encinal, there was some 40 or 50 acres added to those fields. In making my summary in which you arrive at the figure of 13,280 acres, I did not include the whole area of the Malibu, just the grant. Nothing in Ventura county or outside of the Malibu grant. A portion of the Malibu ranch, meaning the portion in the heavy purple line on Exhibit 6, is beach land, where the water comes up practically to the bluff. There are places where there is considerable area of beach sand between the

3466 waters of the ocean and the land that is used for cultivation, or pasturage. Wherever I find this beach sand, whether it is next to pasture land, or next to cultivated land, I have not included it in that particular part in the cultivated crop, but I have in the pasture crop with the exception of two places. The way I got it in my acreage of cultivated land was lands that is actually in cultivation by measurements and by drills of planting grain, and everything else
3467 I put in the category of waste land, with the exception of, I will say, from Zuma to the Trancas there is probably a little waste land there, what you term as beach sands, that was not included. I think with that exception, everything else is included. In the northern portion of the ranch, the portion that lies up near the Ventura county line, the line usually in most places comes just below the crest of the
3468 hills. The hills all slope towards the ocean. In a few instances, the line reaches to the topmost pinnacle of the first range of mountains. The higher portion of the mountain land where you cross the pinnacles of the mountains is fit for pasturing cattle on, as far as the line goes in most places. Some of those mountains rather steep, but they are open in most places. I believe I am safe in saying in all places except where the line is down at the Malibu. There may be some places there where it is not very

3469 good. I think that cattle could pasture all over practically all of those hillsides. As to the sides of some of these canyons across the ranch, the cattle cross over most all of them, on the hillsides. There is exceptional places where it is difficult for them to go, and some places they don't go. I can mention one or two instances of places where it is almost impossible for cattle to go, and they seldom go. One place is a steep
3470 bluff just at the west of Sosto Canyon. The mountain is very steep on the east slope of this hill, and it is almost impossible for cattle to go up and down it. The east slope of this high ridge I spoke of between Lachusa Canyon and Little Alisos Canyon. It is very difficult for stock. There are places where it is difficult for them to go, but if the feed is good, they graze along slowly and work their way over lots of places where they would not go if it was not for
3471 reaching out a little farther to get a little more feed. They will go wherever they find the good feed, if it is possible. That does not necessarily apply when they want something to drink. They go different routes when they want to go for water. They usually select some route or place along in that direction until they become thirsty, and they probably they are close to the water and they pick up their head and walk on in and get a drink, and usually come back a ways and start grazing and feed on up the mountain. As

3472 a usual thing, around near the water places the feed is short, and they graze as long as the feed is good, and then they probably walk down to water. Alisos Canyon is a very steep canyon with very steep walls. On the extreme walls the cattle do not pasture up and downs the walls of the canyon. After you get further up the canyon they do. The cattle graze about that part of the canyon that lies between the canyon
3473 and the present traveled road. They go up and down those walls. The walls are not so steep between the canyon and—in places they are, but the majority of places they walk along. There are places they go and places they cannot go. They follow up and down those trails and graze around on the sides as far as they can. For a certain distance there is places along the canyon it is almost impossible for them to get to, but a cow can usually go where the grass
3474 grows in grazing.

Q. Then I take it the testimony at the former session is that the only place that a cow cannot go with facility is under a bridge. Is that right?

A. That is one place she won't hardly go. There is a difference in cattle. Take dairy stock or home-raised, as we call them, milk-fed calves, they will go most any place. Take range stock that is raised in the mountains, they are very shy of any obstacles in the way of timbers

3475 or bridge, or anything like that. They are very shy of it. The steer is the most shy of either of them. You take the Arizona and western steers, raised out on the desert, they very seldom see a man. You would have a nice time getting him under the bridge. Some of the Malibu cattle are wild, very wild. They come in contact with human beings occasionally. That applies to the bulls also. Part of the land that
3476 was formerly pasture land has been employed in laying out the road which now runs through the ranch from Las Flores to the Ventura county line. I believe about a mile and a half. The road through the pasture is not in use at the present time. It has not been completed. That is from Los Trancas to Steephill Canyon. That was built in January of this year. That is not part of the main road which runs from Las Flores through to the Ventura county line,
3477 the road that we traveled over when we were up there. It is a road I was building to stay between the fields and the foothills, it was our intention to build a road and to keep it back of the fields, dividing the pasture and the fields from Zuma to the upper part of the ranch. That was taken from the pasture land. The main road which runs through the ranch which we traveled over, was taken from the pasture land in places and from the cultivated land. I couldn't say when that road was built. It was there

3478 when I came on the ranch. I have been there about 19 months. There was an extension of the road built from Nicolas Canyon on to the Ventura county line and beyond since I came. That is a part of the main road. It had at one time been a road, over parts of this, and there was parts of the road built new. We repaired the old road and made new, when it came into contact with the road we were building, but I built the road back of the fields from Nicolas
3479 to Sequit. That was done in November and December, 1917.

By the Court:

The old road was rebuilt from Sequit to the Ventura county line?

A. Yes, the same right of way that had been used in years previous.

By Mr. Anderson:

Since I have been on the ranch there has never
3480 been any road, either the old one or the one that was rebuilt, at the point where it crosses the Ventura county line, excepting the road that is there now.

By the Court:

I mean that the road is in the same place now as it has always been, with the exception of Nicolas to Sequit.

By Mr. Burnell:

I came on the ranch about May 20, 1917.

3481 F. B. SCOTTON,

recalled in behalf of the defendants, testified as follows:

Direct Examination.

Mr. Anderson: If the court please, we have here a map which purports to be a map of the portions of the Malibu Ranch showing cultivated fields, survey made by C. R. Brawner, civil engineer, 402 Higgins Building, Los An-
3482 geles, California, December, 1917, ending at Ramirez Canyon, and embracing the cultivated fields east of Ramirez. And Mr. Burnell will stipulate that if Mr. Brawner was on the witness stand he would testify that the surveys was correct, and that the parcels shown contain the amounts of acreage as shown on the map.

Mr. Burnell: So stipulated.

Mr. Anderson: We will not introduce this map as such. We will simply have Mr. Scotton
3483 take it and interpret it into the record. Mr. Scotton, I will show you the map that I have just referred to, and will ask you to take that map, beginning with the parcel at the eastern end of the map, and take each parcel separately, and give the amount of acreage and describe as near as you can where it is located on the ranch.

Mr. Burnell: Just a suggestion, wouldn't it be better to have the document introduced at least for identification, so the record will show what he is referring to?

3484 Mr. Anderson: Yes, I think so. We have no objection to it for identification, and will produce it at any time you wish it.

The Clerk: Defendants' Exhibit 23. (This or a copy of this is one of the exhibits to be certified up by the clerk.)

Mr. Anderson: Now, take Exhibit 23 of the defendant, and proceed in the manner that I have suggested.

3485 A. There are three parcels of cultivated land. Commencing at the south, one piece contains 6.2 acres, south of the railway. Immediately north of the railway there is a parcel containing 15.8 acres, which extends northerly to the present ranch road. The third parcel between the present ranch road and the base of the hills to the north, contains 73.6 acres. These three parcels are west of that certain fence on the Malibu Flat that separates the alfalfa and vegetable 3486 lands east of that fence from these three parcels that I have just described. They are west of the Malibu Creek. The proposed right of way of the so-called main road passes through the third parcel, that one containing 73.6 acres. Commencing on the eastern end of sheet No. 2, this parcel extends from the west bank of Winter Canyon to the east bank of Marie Canyon and contains 90 acres. The proposed right of way for the main road intersects the southwest portion of said block of 90 acres. The next parcel

3487 between Marie Canyon and Puerco Canyon contains 24.6 acres and the proposed road intersects the southerly portion of the parcel. The next is between Puerco Canyon and another canyon not marked, immediately west of Puerco, and east of Corral. This parcel contains 52 acres. Portions of the southerly part of the lot are intersected by the main road. The next parcel is just east of the canyon last mentioned and
3488 contains 13.2 acres and the portion of the southerly end of that parcel is intersected by the proposed road. There was a gulch to the west of that 13.2 acres and a second gulch marked upon this map to the west of the first gulch and between those two there is a parcel of 4.6 acres. I think the road does not touch that parcel. Between the last mentioned gulch and Corral Canyon is parcel 9.4 acres across through the southerly and westerly portion of which the
3489 proposed road does pass. I have now sheet No. 1 which commences to show areas of land whose easterly boundary is Latigo Canyon or just west of Latigo Canyon, there being a stretch between Corral Canyon and Latigo Canyon of a mile and a half or two miles. The first parcel is south of the present ranch road and contains 9.3 acres. There is a parcel north of the road containing 20.1 acres and west of these two parcels there is a gulch and west of the gulch there are two parcels of land, one south of the road containing

3490 10.2 acres and one north containing 24.2 acres. West of these two parcels is the Escondido Canyon. The proposed road does not pass through any of those four parcels. West of Escondido Canyon up to a gulch that extends through this cultivated area there are four parcels, three of which are south of the present ranch road, the most easterly containing 18.8 acres, the middle one containing 10.9 acres. The
3491 westerly one contains 8.7 acres. The fourth parcel being north of the present road, the present ranch road, and containing 46.4 acres. The proposed main road does not pass through any of these parcels. West of the last mentioned through gulch there are two parcels up to another gulch at the northern end of which is a fenced area marked "Spring." One parcel is south of the present ranch road and contains 11.9 acres. The parcel north of the present
3492 ranch road contains 25.8 acres. The proposed road does pass through the northwesterly portion of the 25.8 acre piece north of the road. Commencing now at that gulch shown on sheet No. 1, at the head of which is a spring enclosed with a fence, there are seven parcels. Of the three south of the road, the most easterly contains 8.1 acres, the middle one 22.8 acres, and the westerly one 25.1 acres. The proposed road does not pass through the easterly or central one of these three parcels, but at the north-

3493 western corner of the last mentioned parcel containing 25.1 acres, the proposed road does pass through a portion of it. Of the four parcels north of the present ranch road, the most easterly contains 24.7, the next one contains 26.8 acres, the southwesterly one 21.7 acres, the northwesterly one 12 acres. The proposed road passes through three of these, being the 24.7, the 26.8 and the 21.7 acres. This brings us to the fence on the eastern bank of Ramirez
3494 Canyon. That completes this map.

I am familiar with the lands that are in cultivation on the portion of the ranch that is known as Mrs. Rindge's portion, which is not included on that map, and with the acreage. I can describe them: West of that certain fence testified to by on sheet 3 of the exhibit 23, there are several parcels of cultivated land, the most southerly containing about 41.9 acres, which is
3495 on the west side of the Malibu Creek. It is cultivated to alfalfa. On the east bank of the Malibu Creek there is a parcel containing 3.9 acres, which runs practically from the top of the sand hill back to and a little north of the round corral on the east bank of Malibu Creek. The proposed road passes through this 3.9 acre piece. It is a strip running northerly and southerly, and the road runs through three-quarters of its length and through the round corral, and from there crosses the Malibu Creek in a west-

3496 erly direction. I am referring to the proposed road. The proposed road does not pass through the 41.9 acres first mentioned as being the alfalfa. North of the 41.9 acres is a parcel of 48.24 acres through the southerly portion of which the proposed road runs in an easterly and westerly direction. Of this land mentioned, 48.24 acres, there are several pieces of cultivated land the areas of which total about 50
3497 acres through which the proposed road does not pass. That is cultivated to grain. That is all the cultivated land near which the road passes.

Q. I want the entire cultivated area in the canyon other than those shown on the 23 acres.

A. North of the last two areas of about 50 acres, is 28.24 acres, and there are several parcels of land around about the Malibu camp, the most easterly of which is in barley and corn and contains about 15 acres. North of the camp
3498 there are several fields totaling about 10 acres additional. West of that is a walnut orchard of about 6.89 acres and south of that there is an alfalfa field of about 5 acres. South of that there is a lemon orchard of about 7 acres, lemons and other fruit trees, west of Malibu Creek, and directly west of the lemon orchard there is an alfalfa field of about 4½ acres. Up in the Malibu Canyon a short distance from the walnut orchard there are fields that have been cultivated and planted to vegetables and hay total-

3499 ing about 12 acres. Coming now to the southwest corner of Malibu Flat there is a field containing 12½ acres of hay and a second field containing 6.6 acres of hay. West of that, over the little ridge in the bottom of Winter Canyon there is about 22 acres planted to corn this year and vegetables. I think that covers them all. I have been familiar with this ranch seventeen years. During the time I have been familiar
3500 with it I have had occasion to study the different kinds of land on this ranch and their adaptability to different purposes. The approximate amount of arable land in what is known as Malibu Canyon, which includes the Malibu Flat, is something in excess of 400 acres. I know the amount of arable land in Zuma Canyon, from the ranch line down to the ocean; that is about 120 acres. I know the amount of arable land in Trancas Canyon—35 to 40 acres. Also
3501 in the Sequit Canyon, about 50 to 60 acres. There are other canyons which between the canyon sides have arable land, besides the ones I have mentioned, Malibu, the Zuma, the Trancas and the Sequit; they are Corral Canyon, 20 to 25 acres; Sosto Canyon, 10 to 15 acres; Ramirez, about 10 to 15 acres. No others. All, or most all, would have one or two acres. The others are negligible. Coming back now to the Malibu, almost all of the arable land there is cultivated, and is cultivated to the kind and

3502 character of products I have described. The class of cultivation or agriculture the land in Corral could be put to is various kinds of grain, corn and hay, some vegetables. And in Sosto the same; in Ramirez the same; in Zuma everything or anything. Zuma Canyon is the same character of soil approximately as the Malibu, and it could be used for practically the same purposes as Malibu has been and is being used.

3503 In the Sequit, the type of land is rich bottom land the same as Zuma and Malibu.

Cross-Examination

By Mr. Burnell:

In answer to these various questions as to the amount of arable land, I have not given my idea of the total amount of arable land in the whole Rindge Ranch, the Malibu Ranch. My answer was confined to the section east of Ramirez Canyon. There is a large portion of the

3504 ranch west of Ramirez Canyon that is not shown on these maps. There is in the whole Malibu Ranch that is arable land, whether it is actually cultivated or not, pretty close to 3000 acres, 2700 to 3000 acres. The land actually under cultivation at the present time is approximately within about four or five hundred acres of that—about 2500 to 2600 acres. Sheet 3, Exhibit No. 23, does not show the location of the proposed highway. It shows the location of the present road through Malibu Ranch, by two

3505 full lines running in an easterly and westerly direction to a southwesterly direction. That is the portion of the map that bears the word "road." The width of that road, on the ground, as used, it is about 12 feet. No portions of that road are fenced on both sides. The width of the road is 10 or 12 feet. The present road runs through some of the cultivated land that I have described.

3506 Mr. Anderson: I would suggest, and I don't want to curtail the examination, but I am going to request that the jury may look at this map and they can see which it runs through and which it does not.

Mr. Burnell: No objection to that.

None of the sheets on Defendants' Exhibit No. 23 show the location of the proposed road. The map, Exhibit 23, does not disclose the nature of the use to which the cultivated land is

3507 now put—nothing to indicate whether it is alfalfa land, barley land or hay land.

Mr. Burnell: Mr. Scotton, would it be probable or possible to place a tracing of the proposed road upon that map so we would have before us not only the present road but the proposed road where it passes through this property?

Mr. Anderson: We haven't any objection. Of course it would be only approximately.

A. I was trying to see if there was anything to identify our south line. (Witness examines

3508 map.) Yes, I think it could. I think with the use of the exhibits in the case our engineer can mark it upon the map.

Mr. Anderson: I will see that he does it.

The Court: If Mr. Scotton could do it himself it would be all right.

F. B. SCOTTON

resumed the stand for further

Direct Examination

3509 By Mr. Anderson:

The map which I hold was given an exhibit number, 23. At the adjournment of my testimony when I was last on the stand I was requested by Mr. Burnell to place on that map as near as I could the approximate location of the proposed road. I have done so. I have it on the map at the present time. I have placed it thereby drawing a line with a green lead pencil

3510 and marked it "Condemned." I find that the road as located on the ground differs from my recollection before. The location I have placed on the map is approximately its exact location.

Mr. Anderson: Have you with you the tax statement for the Rindge property for this year?

A. For the Malibu Ranch Grant I have.

Q. Does that show the assessment on the May K. Rindge portion of what is known as the Keller or Malibu Ranch property?

A. Yes, sir.

3511 Mr. Burnell: That is objected to as incompetent, irrelevant and immaterial.

Mr. Anderson: We have a theory as to whether or not it is the best evidence—that may be a question.

The Court: That is the point exactly.

Mr. Anderson: Very well, then. We will ask the assessor to bring the matter in here.

Mr. Vallee: If Your Honor has any doubt
3512 on the question of whether or not the assessor can testify as to the assessed valuation of this property, we have the authorities from the Supreme Court of this state on the point.

Mr. Anderson: I think counsel is right as a general proposition, but our proposition is that when the county of Los Angeles seeks to condemn land and any of its officers fixing the valuations, the act of its officers is binding on the county. I think it is an exception to the gen-
3513 eral rule. I concede the general rule to be as counsel has stated.

The Court: I am aware of the general rule.

Mr. Anderson: That would be our position.

The Court: Objection sustained.

(Exception No. 59.)

Mr. Anderson: Then do I understand that waiving the question of this not being the best evidence—

Mr. Vallee: We will waive that feature.

Mr. Anderson: Then for the purpose of the

3514 record and waiving the question of its not being the best evidence and the competency of the witness to testify, I will simply ask the witness the question for the purpose of the record. Do you know the assessed valuation placed by the county assessor upon the land, the two portions of the Rindge Ranch, the Rindge portion and the Rindge Company portion of the Malibu Ranch proper. That calls for a yes or no answer.

3515 Mr. Burnell: That is objected to as incompetent, irrelevant and immaterial.

The Court: I suppose the theory is that because the county of Los Angeles are plaintiffs in this action, that this is an admission against interest.

Mr. Anderson: Exactly. That is the theory precisely.

The Court: I am not going to rule on it now.

3516 I think the matter is worthy of some consideration.

Mr. Anderson: There is no shadow of a question as to the general rule.

The Court: But where a public corporation, or political subdivision thereof, such as the county, is seeking to condemn property and when they themselves or one of their officers, duly elected and qualified officers have made a valuation on a certain piece of property, which ought to be condemned, whether or not it is in

the nature of an admission against interest is a question. If you have any authorities on that, you may present them later.

J. C. PATTON,

recalled in behalf of the defendants, testified as follows:

Direct Examination.

Mr. Anderson: If the court please, in going over the evidence very carefully, I find that Mr. Patton was not asked about water conditions in one of the canyons, and I ask permission to supply that. The Sequit Canyon was entirely omitted in both his direct and cross.

(The Witness): I am familiar with Sequit Canyon, and with water conditions there, both summer and winter. The water conditions at present and at rainy seasons, there is water all along. At present and in wet seasons, the water is running in the Sequit Canyon. The water in the Sequit Canyon, in the summer and spring, it is away up the mountains. There is no water in the Sequit Canyon below the proposed right of way, at dry times.

Cross-Examination

By Mr. Burnell:

The nearest water south of the proposed road in the vicinity of this canyon is at the Willow canyon, about half a mile from the Sequit Canyon. That is natural water. There is no

3520 water that has been conveyed by pipes, ditches, or other means to the Sequit Canyon where it crosses the proposed road.

Redirect Examination

By Mr. Anderson:

There is water in the Willow Canyon in dry seasons. It runs at all times; it runs to the mouth of the canyon.

Mr. Anderson: I am about to exhibit to the
3521 jury Plaintiff's Exhibit 23, and I think it would be advisable for them to commence their examination with the third sheet; and I will call the jury's attention to the fact that the line in green is the route of the proposed right of way for the main road.

Mr. Burnell: Better term it the condemned route.

(Map exhibited to the jury.)

The Court: These exhibits will all be avail-
3522 able to you later on, gentlemen. If you desire to examine them now, you may do so. Have you any other witness?

Mr. Anderson: With one exception, as I explained to Mr. Burnell. There was a question in Mr. Patton's testimony as to the exact location of certain springs in Marie Canyon, and I have asked Mr. Patton to go physically on the ground and determine the location of these springs, and stated to Mr. Burnell when he ascertains that, he will be called back. With that

3523 exception, that is all. We rest in the three cases with that exception.

ALEXANDER CULVER,

a witness called in behalf of the defendants, being first duly sworn, testified:

That his occupation is, and for 24 years had been, that of real estate agent and appraiser; that for many years he handled and sold lands of all kinds, city, country, farm, alfalfa, and 3524 then commenced to buy and sell for himself, having laid out many subdivisions; that he had been appointed referee by the Superior courts of this county in land cases; and had acted as appraiser for Los Angeles county for the purpose of county roads through different ranches; that he had in the past appraised many large ranches for various purposes (enumerating many of them); that he was thoroughly familiar with the 3525 Malibu Ranch, having been over it a good many times—first about 20 years ago, and since 20 or 30 times; that some of the other ranches that he had appraised were similar in their general character to the Malibu Ranch; that from his varied experience as appraiser he had familiarized himself with the reasonable market value of ranch property throughout Southern California, and of the kind and character of the Malibu in this section of the state; that he was familiar with the map Exhibit A, and had had it

3526 before him in all of his investigations for the purposes of this suit.

That he had made an estimate as to the amount of land that is taken by the proposed main road out of the 60-foot right-of-way of the Port Los Angeles Malibu and Southern Railway, commencing at Los Flores Canyon, so far as the ranch is concerned, and running through the ranch to the Ventura county line, as far as this ranch is concerned.

3527 This witness was withdrawn at this point, but was recalled at a later stage of the case, and further testified on direct examination:

That the parcels so taken by the proposed main road from the right of way of said railway are parcels 301 to 310, both inclusive, as they appear on said Map Exhibit A, contain a total area of 2.95 acres, and are of the reasonable market value of $59.06; that he had given

3528 an average value of $20 an acre throughout.

That he is familiar with stock ranches and the stock business, having been familiar during the last fifteen or twenty years with stock and stock raising and stock ranches generally, familiarizing himself with those matters both by actual experience and by association with men of large and long experience in that business.

That, in his opinion, based upon his knowledge of the situation generally and upon his experience, the construction of the proposed main road

3529 through the May K. Rindge portion of the Malibu Ranch in the manner proposed, including the taking of the various parcels, would be a damage to that portion of the said ranch, for the reasons that it would be impossible to handle the cattle on the hoof with a pubiic highway such as the one proposed, if it should be taken out of Mrs. Rindge's portion of the land; that the May K. Rindge portion of the ranch is noth-
3530 ing but a cattle ranch, a stock ranch, which includes cattle, beef cattle, native cattle, horses, sheep and hogs.

That the reasonable market value of the forty foot strip right-of-way for the main road from Los Flores Canyon to the western boundary line of the May K. Rindge property on the 30th day of Sept., 1918, was $3,862.76.

That the reasonable value on that date of par-
3531 cels 21 to 21a (on Exhibit A) both inclusive, was $97.24.

That the reasonable value—market value—on said date of the 1947 acres constituting the May K. Rindge portion of the Malibu Ranch was $180,900, segregated as follows: 1650 acres pasture, $20 an acre, $33,000; 197 acres Malibu Flat, rich, alluvial, $700 an acre, $137,900; 100 acres mesa, hay, at $100 an acre, $10,000.

That in his opinion the damage in dollars and cents to said portion of said ranch by reason of the taking of the 40-foot strip and the various

3532 parcels 1 to 21a, inclusive, would be fifteen per cent, or $26,016.

That in the said portion of said ranch there is 175 acres lying south of the northern boundary of the Port Los Angeles, Hueneme & Southern Railway right-of-way, worth of Sept. 30th, 1918, $3500, or $20 an acre.

That all of his valuations are the reasonable market value on the date testified to.

3533 That the reasonable market value of the Rindge Company portion of said ranch on Sept. 30th, 1918, was, in his opinion, $453,860, segregated as follows: 9093 acres, pasture, at $20 per acre, $181,860; 2120 acres, hay and grain, $100 per acre, $212,000; 120 acres, alfalfa, $500 per acre, $60,000.

That the reasonable market value on said date of parcels 21 to 146, both inclusive, was, in his opinion, $794.40, and of the 40-foot strip right-
3534 of-way for the main road through the Rindge Company portion of the ranch, $5807.60.

That the construction of such a road as that shown on Exhibit A, together with the turnouts shown in the parcels, would, in his opinion, be a detriment to the Rindge Company portion of the ranch, for the same reasons given as to the other portion; and that, in his opinion, the damage that would result from such segregation, fixing them at the reasonable market value as of date Sept. 30, 1918, would be $62,642.70, or a damage of 15 per cent.

3535 That the land on the Rindge Company portion of the ranch lying south of the northerly line of the right-of-way of the Port Los Angeles, Hueneme and Southern Railway consists of 682 acres—482 acres of pasture land at $20 per acre, $9,640, and 200 acre of mesa hay land, at $100 an acre, $20,000; that of this land, 422 acres is embraced in said railway's right-of-way, all being pasture land; that the remaining 60
3536 acres of pasturage is the Point Dume land; and that the land not pasture lies east of Point Dume toward Ramirez Canyon.

His testimony as to reasonable market values of the various items affecting the Alisos Canyon road, as of the date of the commencement of the Alisos Canyon road suit, were as follows:

40 foot strip, $184; parcel No. 1, $78; No. 2, $142; total $404.00.

Damage due to severance, irrespective of the
3537 construction of any other road contemplated, one per cent, or $3,545.72.

Cross-Examination.

The cross-examination of this witness was substantially the same in the matter of the substance of the facts elicited as his testimony on his direct examination. The witness also testified that he had formed an opinion as to the number of beef cattle per acre that the ranch property would support or take care of. That in his opinion it was one head to ten acres, not including the yearling calves.

3538 The witness was also examined on redirect and recross but nothing further of substance elicited.

Monday, Dec. 2nd, 1918.

T. M. CAMFIELD,

called as a witness on behalf of the defendants, being first duly sworn, testified:

That he had resided in Los Angeles 32 or 34 years; that he had previously resided, on
3539 a stock and agricultural ranch, in the lower part of this county, now a part of Orange county; that he has known about stock ranches and been familiar with stock raising for 42 years, ever since has been in this country, to which he came at the age of fifteen.

That he is a real estate appraiser and broker, and had been in that business 32 years, buying and selling considerable land for himself, ap-
3540 praising a great deal of land for corporations and estates, among others, about two years ago, the properties of the deBaker Estate, including the Laguna Ranch at the edge of the city of about five thousand acres, and several hundred acres of bean land just this side of Santa Monica; that he is thoroughly familiar with the Malibu Ranch shown on Exhibit 6, having first gone actually upon it about three years ago, and ten or fifteen times in the three months preceding his testimony—the latter with a view

3541 to ascertaining the character of the ranch and the purposes for which it is adapted and its value, also going over it with other witnesses some of whom have testified, and with Mr. Culver and the attorneys for the defendants.

That he had appraised other ranches of a similar character both in that vicinity and elsewhere in Southern California.

That he was thoroughly familiar with the
3542 Map Exhibit A in five sheets, four being on a large scale and covering the entire route of the proposed main road from Los Flores Canyon to the Ventura county line, and the fifth being a map of the entire Malibu Ranch.

That from scaling the map, Exhibit A, he found that the May K. Rindge portion of the ranch contained 1947 acres; the legend on the map shows that.

That he is familiar with the 40-foot main
3543 road right-of-way strip on that portion of the ranch, and that, in his opinion, its reasonable market value was $3,112.76; and of parcels 1 to 20-A (Exhibit A), $387.24; and of the total 1,947 acres of the May K. Rindge portion $161,200—all values being given as of Sept. 30, 1918.

The following also took place:

Mr. Anderson: I would like to say to Your Honor that Mr. Burnell and I have agreed that we can give the testimony as to these parcels

3544 in the aggregate and we intend to file a written stipulation to the effect that each parcel may be deemed to have the proportionate value that its acreage bears to the entire acreage of the aggregate parcels. That is to avoid having to give interminable testimony on each of these parcels.

Mr. Burnell: In other words, the jury may find the value of the property sought to be
3545 taken from Mrs. Rindge and the value of the property sought to be taken from the Rindge Company without going into the details of all the parcels.

Mr. Anderson: That is stipulated.

That the construction of the main road as proposed through the May K. Rindge portion would cause damage and detriment to that portion, which damage, in his opinion, so caused would be $23,128.

3546 That in looking the ranch over very carefully, it was his opinion that the construction of the proposed road would reduce the selling value of that ranch more than the amount he had named.

Q. What reasons have you for arriving at that conclusion? A. In the first place it destroys the privacy of the ranch. They have the ranch alone there, more or less of a private ownership, between 21 and 23 miles long, with the ocean on one side and a fence at each end, and I understand now they are fencing the

3547 north line. That property is by itself. No one can get in there but the owners and their employees and friends. They can turn their stock loose and it can wander from feed to water at will, wherever they want to go and by running that lane or forty-foot road through that ranch and fencing it on both sides, it would practically cut the ranch in two, cut off the stock from the food or water on one side or the other,
3548 making really two ranches of it. In my opinion it will greatly increase the cost of operating the ranch. Now stock can run at will, the vaqueros or stock men or owners can go from one part of the ranch to another, riding across there 20, 30 or 40 miles an hour if they want to. On the other hand, if they have to carry keys for the gates, get off the horse, lock a gate, go across the road, unlock a gate and drive through and lock it up again, it will take a
3549 lot of time and expense, and, as I said in the first place, I think it would reduce the selling price more than I said.

The witness further testified that while private roads now ran through some of the fields, they were easily moved and he understood that surveys had been made to move them to the upper or lower side of each field; that the construction of the proposed road would increase the cost of cultivating and keeping up those fields and roads; keeping them up would be

increased from the fact that where there are large acres they use large tractors and very large teams, six, eight or ten head of stock, and it costs a lot of money in each day's operations, in turning, whereas if they have long rows, two or three miles long, as they can do now, they can plow across the roads now if they want to and make the road over; but with the fences up there, the road will be established.

That upon Mrs. Rindge's part of the ranch from Marie Canyon to Las Flores he figures there were 1650 acres of pasture land at $20 an acre $33,000
197 acres in Malibu Flat at $600 an acre 118,200
100 " of farm land " $100 " " 10,000

Total.....$161,200

That the nearness of transportation facilities does not enter into the value of bean land very much. As far as the sales of bean land are concerned, I suppose the Santa Monica land is about as favorably situated as the Ventura county bean land. It would not make much difference, particularly the way beans have been the last year or two. That it is true that the Ventura county bean land has a great many public roads running through it. The state highway from Los Angeles to Santa Barbara passes through Ventura, which highway will eventually go to San Francisco. That this does not enhance the value for growing beans or for

3553 lands at all. That the fact that it can be reached by automobiles and trucks does not help a bit. That farmers always have their own roads to get in and out. It might make it easier; it might not require so much power to get a thresher from one field to another, but they always have the power there and they get there. I don't think that the question of good roads has anything to do with the value of bean land in the market. That he considers the property 3554 of May K. Rindge best adapted to a stock ranch. That he just assumes that it is best adapted to a stock ranch.

That the construction of the main road, taking the 40-foot strip and the parcels, through the Rindge Company portion of the ranch would also damage that portion for the same reasons.

The witness then gave the following valuations as his opinion of the reasonable market 3555 value at the date of the commencement of the Main Road Case of the following matters:

40-foot strip of main road proposed to be taken through Rindge Co. portion, $5,807.60;

Parcels 21 to 146, both inclusive, $794.40.

He further testified that, in his opinion, the damage to the Rindge portion of the ranch by reason of the construction of the proposed road in the manner indicated on Exhibit A, with the various turnouts indicated, would be $62,627; and that his reasons for that opinion are exactly

3556 the same as those given concerning the construction of the proposed road through the other portion of the ranch.

That, in his opinion, the aggregate value of the Rindge Company portion of the ranch on Sept. 30, 1918, was $453,860.

That the property of the Rindge Company consists of 9,093 acres pasture land at $20 per acre, $181,860; 120 acres bottom land and
3557 2120 acres of grain land.

Concerning values in the Little Alisos Canyon Road Case, as of the date of the commencement of the action in that case, he testified:

That the 40-foot strip right-of-way for that proposed road was, in his opinion, of the value of $184; the parcels, $220.

He further testified that the construction of that road would, in his opinion, damage the entire Rindge Company portion of the ranch,
3558 and to the extent of $3,545.

His testimony as to the acreage to be taken from the right of way of the railway, and its value, was the same as that of the witness Culver.

At the present time he has seen them come to the private road and then they could plow across; then build another? Just drive across. It is not expensive; much less than turning around.

Q. You think if they were to plow up the

3559 present road where it goes through the agricultural land it would not be a matter of expense to make a new road? A. Absolutely not.

Q. You don't think it would cost $500 a mile? A. Not five cents; it would not cost anything. All they have to do is drive through.

Q. If this present road was plowed up and they wanted to make a new road they could drive over it and make it? A. The chances
3560 are it was made that way.

Q. It wouldn't cost anything? A. Never cost me anything in making that kind of a road. Q. You would not figure it would cost as much as $500 a mile to make such a road. A. I am not considering the bridges, the arroyos and the barrancas. Across a level piece of ground it does not cost much to make a road, if anything.

Cross-Examination.

3561 That he had taken from the assessment books of Los Angeles county the entire assessment of the Malibu ranch as a whole, including both the May K. Rindge and the Rindge Company portion, but not including personal property, and that the total of said assessment for taxes was $416,580, which is supposed to be 50% of its value, and which would make it $833,100.00, 100%, according to the assessor's figures; that the assessor himself put the value at 50%, and told the witness that he has done so—the asses-

3562 sor, Mr. Hopkins; that he had driven through stock ranches in automobiles and where there were cattle over public roads, and had observed that the cattle was sometimes frightened and sometimes not.

LESTER C. REED,

a witness called on behalf of defendant, being first duly sworn, testified as follows:

That he resided at Oxnard, Ventura Co., and
3563 was superintendent of the Broome estate (Guadalasca) ranch situate along the coast beginning at a point about 8 miles this side of Oxnard and extending about 8 miles down the coast towards the Malibu ranch, containing approximately 24,000 acres, and that he had been manager of the same a little over 3 years.

That the general character of the ranch is for stock and agricultural purposes; that they
3564 have stock upon it mostly beef stock; that there is about 4,000 acres under cultivation and the rest grazing land.

That he has been engaged in the stock and cattle raising business practically all his life.

That he has gone over the Malibu ranch in a general way several times—over the main part of the ranch only once, but the western end several times; that he is familiar in a general way with the ranch.

Q. Now, assuming that a highway 40 ft.

3565 wide should be constructed from the eastern end of the ranch at Las Flores Canyon to the Ventura county line at approximately the place indicated by the red line that you see upon this Defendant's Exhibit 6, and that the road was properly constructed and fenced, in your opinion would that have any bad effect on (damage) the Malibu Ranch as a stock ranch? A. Yes, sir.

3566 (Witness continuing.) From my own experience with stock and from seeing this proposed route on this Malibu Ranch, in my opinion it would practically ruin the ranch from a stock man's standpoint for a stock range. It divides the ranch up. It is a narrow strip of range anyway. And when you put a highway through it as this proposed highway is proposed to go you separate the water; there is water on one side of the road and pasture on the other, and 3567 then there is pasture on the one side and water on the other, and so on all the way through, and you can't have your cattle divided that way and make them do well or stock of any kind. It would have the effect on them that they have got to either travel too far for water or else too far for their feed, and when you handicap your stock that way you have no stock range at all. It would increase the cost of superintendence and operation.

3568 My experience and observation as to the ability to carry cattle from one side of a public road that is fenced to another for the various purposes that they have to be carried has been that the less you do that the better off you are with your cattle. The less you move the cattle—the more you let the cattle move at their leisure—the better the cattle will get along on the range.

3569 *Cross-Examination.*

On cross-examination this witness testified to substantially the same effect as on his direct examination, and also that the road as proposed with the crossing provided for as shown by the testimony would if built ruin the ranch as a cattle ranch, giving the same reasons in substance as those given in his direct examination.

That except for the extreme end toward the Ventura county line he had only been over the 3570 Malibu Ranch on one occasion.

He further testified that a cow will most always have a certain trail, but they don't generally follow it, they take the easiest way and possibly graze around a radius of a mile square, not often over that unless they have to, but they will graze into this trail and possibly go a couple of hundred yards to water, then they may walk back up the trail a half mile, and then start off grazing again; that is pretty a mile square of territory over which the cow

3571 grazes. They may graze over more than that. That would not ruin the cow. If the cow goes in a more or less straight line it would have a more ruinous effect that if she grazed on the way. That is my opinion of the cattle man. They graze to the water and graze back. That is the best way to fill up a cow.

The witness further testified that his testimony as to the damage which would be caused
3572 by the building of the proposed road was based upon the assumption that it was a stock ranch, not exclusively a cattle ranch; that it might be hogs, sheep, horses, but as a stock ranch; and that the same thing would apply to any stock you put on it.

That he would consider the Malibu Ranch from the examination he made of it exclusively a stock ranch; that he saw that some of it was put into beans, but didn't figure that it was
3573 bean land; that if it was used for bean purposes the road would damage it by cutting up the fields into smaller parcels, and that any practical farmer knows that the more you cut the field up the more work it takes to prepare the same amount of ground for cultivation.

3574 R. B. STRATTHEARN,

a witness called on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Newby:

That he resides at Simi, Ventura county, has lived there about 35 years, and is in the cattle business and farming, and has been for 35 years, owning a 13,000 acre ranch among others in
3575 Ventura county about 16 or 18 miles from the Malibu Ranch through the mountains, the general character of the land on which is pasture, beet land and bean and orchard land; that some of it is mountainous; that he has stock on that ranch, and that he has a lot of other ranches rented.

That he has in a general way familiarized himself with the Malibu Ranch.

That the construction of the proposed main
3576 road through the Malibu Ranch, to-wit: approximately 22 miles long from east to west, with a right of way 40 feet wide, as indicated by the red line on Defendants' Exhibit 6, would in his opinion damage the Malibu ranch to the extent of 20% of the whole valuation thereof; that if he were in the market to purchase such a ranch for stock purposes he thought the depreciation would be 20% of the value; that his reasons for this opinion are the inconvenience and the damage to the productiveness of the

3577 ranch in the production of beef and hogs; that he is talking about a stock ranch; that it would interfere with the beef in this way, that the traffic on the road would prevent the cattle from going and coming to water and that they would not locate at the water springs during the day or anything of that kind; that he was not talking of dairy cattle, but range cattle; that they are all shy and they would not stay
3578 there at all; that they would come in at night and go away if they drank at all; that if the road was fenced so that they had to pass through below it it was very doubtful to his mind if they would go to water underneath the road; that he had had experience on his own ranch of cattle passing under such construction; that the railroad runs through his ranch and there are quite a number of openings, stone arches; that the cattle have had free access to
3579 these openings since the railroad was built, but that to his knowledge there has never been a hoof through those arches, and there was nothing to prevent them going through.

That he had at the time of testifying about 600 head of cattle on his Ventura ranch, but had more cattle up in Inyo county.

That from his experience as a farmer the effect of the fencing of this proposed highway upon the cultivation of this tillable land would be that where the road cut off small patches

3580 here and there it would increase the cost of cultivation about 1/3 in those patches.

That he had sufficiently examined the Malibu Ranch to be able to state what in his opinion would be the reasonable market value per acre for that land—had gone over it for that purpose.

Q. What in your opinion would be the reasonable market value per acre of the Malibu Ranch? A. I have it divided into two pieces.

3581 Q. Yes. A. Mrs. Rindge, 1650 acres of pasture land, 200 acres in the flat, 100 acres in hay land, that totals $174,750. I valued the pasture land at $15 an acre. 200 acres where the lemons and other trees are and where the house is, $700 an acre. The hay land, $100 an acre. The Rindge Corporation, pasture land, 9093 acres at $15 an acre, or $136,395. Hay land 2120 acres, $100 an acre, $21,200. Alfalfa land, 120 acres, at $500 an acre. Now,

3582 that is a pretty high valuation. It is more than I would pay for alfalfa land at any place out in the open market, but as a necessity for that ranch it is worth that much.

Q. That is taken in connection with the entire ranch? A. Yes, sir.

Q. What is the total amount for the Rindge Company value? A. Total amount, $582,845.

The Court: What is the total of Mrs. Rindge's portion?

A. $174,750.

3583 *Cross-Examination*

By Mr. Vallee:

This witness upon cross-examination testified in substance and effect the same as upon his direct examination, elaborating somewhat upon the reasons given by him as to why the construction of the proposed main road in the manner contemplated would damage the ranch, and adding that the going to and fro for water
3584 and the other disturbances incident to the road would detract 50% from the production of beef cattle.

That if the ranch was on the market here for sale after the road was constructed there would be a depreciation of 20% for what could have been obtained for it for any purpose at all before the road was put through; that his estimate of 20% is on the assumption that he would want to use it as a stock ranch; that
3585 the percentage of depreciation taking the ranch as it exists and as he would want to use it would be the same in both cases; that the owners are using it now for a bean ranch in part and would use the same land for pasture afterwards, that is, he would, and that the difficulties are just the same.

The witness at this point corrected an error in his total valuations of the properties; stating his total for both portions at $582,845, divided into $174,750 for the May K. Rindge portion, and $408,395 for that of the Rindge Company.

3586 That on his ranch the arches through the railroad were 14 feet high and 10 feet wide; and there was water both above and below them; but that the water below was very much nearer than the water above; that the cattle went over the ridge in preference to going through the arches; but that he never tried to drive them through.

Redirect Examination.

3587 The witness testified that he would regard the Malibu Ranch as suitable for a stock ranch, and that only; that on a stock ranch it is necessary to cultivate some of the land; that on such a ranch you raise crops to feed the cattle and hogs; that he would consider the agricultural purposes incidental to the main purpose of a stock ranch; that he would want to increase the carrying capacity of the ranch by doing so.

GEORGE RILEY,

3588 a witness recalled on behalf of the defendants, testified as follows:

That he resided in Ventura county, was manager of the Potrero Ranch of 8500 acres, located partly in Los Angeles and partly in Ventura counties; that he was familiar in a general way with the Malibu Ranch; that he would consider it a stock ranch; that assuming that a highway was to be constructed from the east end of the Malibu at Las Flores Canyon to the Ventura line west along the route indi-

cated by the red line on Exhibit 6, such a construction would in his opinion damage the Malibu Ranch; that, with reference to stock purposes, it would injure the ranch in working the stock; that it would interfere with the operating of it as a stock ranch; that the passages provided by the plans for the proposed road and already testified to would not be sufficient to operate it as a stock ranch; that it would be a very unhandy way and hard to handle stock; that if at certain seasons of the year cattle would have to pass from the north end to the south end of this road through these passages for watering purposes and grazing purposes, it would be very unsatisfactory, and would injure it as a stock proposition; that if it was put on the market as a stock ranch he would not have it with the road there at all; that it would affect the market value of such a ranch to the extent, he should judge, of at least 25%.

Cross-Examination

By Mr. Burnell:

That he means if he owned the place he wouldn't have a road through here for 25% of the price of the ranch; that his testimony is based upon his personal views as to what the ranch would be worth to him as a stock ranch; that he has viewed the property purely as a stock ranch; that as to the cultivated por-

3592 tions which he had observed on the ranch and saw in cultivation he had come to the conclusion that if he had the ranch he would farm those for the benefit of stock, horses and cattle; that he did not think that the land he saw cultivated to beans was very good bean land.

That he had had charge of and experience with a cattle ranch of a similar shape and size as the Malibu traversed by a road in the man-
3593 ner the Malibu would be traversed if the proposed road is built through it, having been superintendent of the Jesus Marie Ranch in Santa Barbara county about 20 miles long containing about 45,000 acres along the coast which had a road nearly from one end to the other—a public road; that said ranch was used for a stock range, and that he found that that road interfered greatly with the use of that ranch as a stock ranch in moving stock and the road
3594 cut into the waterings and they were troubled a great deal with trespassers; that the cattle on that ranch could get from one side to the other only by crossing over the road; that he does not think that would make a great deal of difference upon the Malibu Ranch; that you would probably have to move most of them over anyway—put on gates and drive them across; that the cattle might find their way back and forth under the bridges if the bridges were high enough and long enough; that with

3595 such a bridge as the one proposed to be built across Carbon Canyon 40 feet wide with a clearance of 10 feet from top to bottom, the bridge would not be wide enough for cattle to go through; that you would have a good deal of grief trying to get them through; that as to the bridges generally if the cattle wanted to drink and were on the other side of the road from the water some of the cattle would 3596 go through and some he thinks never would; that some of the cattle would go without water rather than go through the bridge.

Wednesday, November 27, 1918.

ED C. CANET,

a witness called on behalf of defendant, being first duly sworn, testified:

Direct Examination

By Mr. Anderson:

3597 That he lived in Ventura, and had off and on since 1872; that he is in the stock and fruit business, owns a cattle ranch, a stock ranch, of about 5,000 acres, between Ventura and Ojai on Ventura avenue probably 40 miles from the Malibu; that he has been in the stock raising business practically all of his life, and on his ranch raises cattle and sheep; the ranch being mountainous; that he also raises beans and apricots; that he is sufficiently familiar with

bean lands to be able to pass judgment on them from a practical point of view.

That he had been upon the Malibu Ranch, had visited and was familiar with all of it, and used to run sheep and cattle there with Mr. Sentous; that he knows the nature and character as a stock ranch, and that it is practically a stock ranch and nothing else.

That in his opinion to put a road 40 ft. in width through the ranch along the line shown in red on Exhibit 6 and fence it on either side with bridges or cattle passes not to exceed 13 in number throughout the length of 22 miles would be a big detriment to the land. He then gave the following reasons for this opinion: In the first place the ranch is a very extended ranch. Stock don't do well when they are chased around from one place to another and if they have to go very far to get water, or if they have to go away around, and go through culverts or under bridges and then come back to get back where they started to feed, your cattle are not going to put on any flesh, consequently the fencing up of that ranch in its present extended condition, being so long to the water, practically the water all being in the heads of the canons, you would be fencing off your pasture land and the land you would have below is only good for the summer months as the hills would have to be fed

3601 off while green so that the cattle would be at a great loss. to get down along the coast and feed back up in the hills or go back there for water. The witness further testified that assuming that along portions of the ranch the conditions were reversed the water being exhausted in the upper canyons in summer but with water to the south of the proposed road, it would operate in the same way as he had
3602 just described providing the water was not too far away from the pasture.

The witness then after testifying to his experience with stock ranches and his knowledge of their values in the vicinity testified that in his opinion the reasonable market value of the Malibu Ranch for a stock ranch was about $18 or $20 per acre, and that a stock ranch is what he considered it useful for. He also testified that in his opinion the ranch would
3603 suffer from segregation caused by putting the main road through the ranch in the manner proposed at least about $5.00 per acre—that is, that the reasonable market value of the ranch after the road was put through would be reduced as a whole in at least that amount.

Cross-Examination

By Mr. Burnell:

Upon cross-examination this witness testified substantially to the same effect as on his direct examination. That he is figuring the value

3604 of the ranch on the basis of the return it would bring, and not upon the amount that could be obtained for it if it was put up for sale in the open market. That he doesn't know what it would bring that way. That it would depend on the parties. That he has no knowledge of sales of property situated as this property is situated in that vicinity, having been made within the last two or three years. That he has not
3605 made any inquiry as to the prices at which property *of* held in that vicinity. He further testified that notwithstanding the fact that the ranch was held in two ownerships, the eastern portion by Mrs. May K. Rindge and the western portion by the Rindge Company, nevertheless in his opinion the portion lying west of Marie Canyon was worth $18 to $20 per acre irrespective of and leaving out that portion of the ranch between Las Flores and Marie; and further, that he does
3606 not know of any property suitable for stock raising purposes and situated as is the case with the property of the Rindge Company that has been sold in the open market at from $18 to $20 an acre, the land not being reached or penetrated by a public road. That he has never heard of such a sale at such a price. That he grazes cattle upon the ridges and upon the tops of the mountains. That they walk down to get water. That they walk down the sides of the canyons; they walk down the canyons.

3607 That they make their own roads and trails, and in some places there are roads. That he has found from his experience what cows and cattle if left to themselves always make their own trails to and from water, and that they follow those trails when they make them. That he was acquainted with the Malibu Ranch and had grazed cattle on it. That some of the cattle had grazed up in the mountains at the heads
3608 of the various canyons that go through the ranch. That some of those canyons were dry in summer. That in the canyons the waters come down to along about where the breaks are from the high mountains to the level land or the clear land. That the distance the cattle had to go to get to water—that is, the cattle that were grazing on the tops of the ridges and along the tops of the canyons, the longest distance they had to go to get to water depends
3609 a great deal. In the spring time when the cattle eat up in the hills, they don't require so much water. In the summer time, we have to bring them down to the low lands. They naturally work down to a certain extent themselves, but some cattle get used to a place and they stick around there unless you drive them to the other place, until they get acquainted. In the spring time, the cattle that is grazing on the tops of the ridges drink some water. That the longest distance that any of his cattle had to travel to

3610 get water on the Malibu ranch was sometimes they had to travel two miles about, or in that neighborhood, depending on the place where the particular animal happened to be grazing, and the particular season of the year. That it is true that out of a bunch of cattle some will go to water more frequently than others under any conditions, and some will go to water and some won't. That he doesn't mean that some of the cattle won't go to water at all. That they
3611 will go to water, but that they will stay away so long that they will lose all their flesh.

And further, that even though there was no public road from Las Flores to the Rindge portion of the ranch, if it could be reached by a private right-of-way his opinion as to the value of the Rindge portion, that is to say, the Rindge Company portion—would not be affected by the fact that there were no means of access
3612 by a public road.

He also testified concerning the passageways under the bridges or through the cattle pass that while there might be nothing to prevent the cattle from going under these bridges and through these passes they would not do so naturally; that they could not be easily taught to do so, and that while in one way cattle will find their own way to the nearest water without any difficulty, it is also true that they will probably lie on top of the hill and stay there

3613 all day without water when if the natural passages were open they would have gone to the water; that even if the cattle were driven through these passages to water once or twice after that they would not go there willingly or without being driven, simply because they won't; that they don't though the witness does not know why, they simply don't, that is all—some of them would and some of them would not; that he had had experience in this regard,
3614 and that his testimony was the result of this experience.

WILLIAM MCGUIRE,

a witness being called on behalf of defendants, being first duly sworn, testified:

That he lived in Ventura, was 72 years old past, was retired, had had various occupations, and had been a stock man and connected with the stock business all his life, but still owned a
3615 stock ranch though not actively in charge; that he had been on the Malibu Ranch and looked it over with a view of ascertaining its general nature and character and value; that its general topography is somewhat similar to the ranches he had been familiar with, though the one he had would carry more stock per acre.

That the construction of the main road through the Malibu Ranch along the route shown by the red line on Exhibit 6 and in the

3616 manner and with the passage ways for cattle contemplated would be a detriment to the ranch as it would make the cattle travel further, and it would be difficult to get cattle through; that some cattle would pass through, but that a great many would have to be forced to get them through unless they became very thirsty; that lack of water detracts from your cattle; that they will not fatten so well; that assuming that
3617 they would take the trouble to go the distance necessary to get to and from the water and did succeed in getting the water the fact that they had to travel the extra distance away would be a detriment to them.

That in the opinion of the witness as he had observed and looked over it the ranch was suitable for stock and was not as a whole suitable for any other purpose; that (after qualifying to so testify) in his opinion the reasonable
3618 market value of that ranch, the Malibu, as it stands without a public road through it, what it would probably sell for, is $20.00 per acre; that the amount of damage or detriment to it with a road through it in the manner described he would put at 20% of the value of the ranch, which would be $4.00 per acre.

Cross-Examination.

Upon cross-examination the testimony of this witness was substantially the same as that given by him on direct examination.

3619 He further testified that he did not think that the property known as the Malibu Ranch was suitable for any other purpose than stock raising taking is as a whole; that he did not think it would be suitable for subdividing into small farms; that a large cattle ranch could be handled to better advantage than a small one; that the most money could be gotten out of that ranch by using it for stock raising.

3620 That the fact that there was no public road across the May K. Rindge portion of the ranch, if the Rindge Co. portion could be reached by a private road, would not alter his opinion as to the Rindge Co. portion.

That he believed that the Malibu Ranch would sustain 1400 head of cattle, which is figured out on the basis of so many head to the acre —between 9 and 10 acres per head, calves thrown in; that he don't count calves in mak-
3621 ing the estimate, but referred to the adult cattle.

PERRY A. HOWARD,

recalled on behalf of defendant, testified:

That he had driven several times over the present private road on the Malibu Ranch starting at Las Flores Canyon and going even beyond the Ventura county line, and had observed the nature and character of that road; that in his opinion the least reasonable cost of constructing a road of that character upon that ranch per mile would be about $500.00.

3622 That in addition to his former experiences as road contractor and constructor he had had experience in the matter of stock raising all of his life; that until he came to this country when he was about 29 years old he did nothing else but stock raising in Kansas and Indian Territory; that he is now 59 years of age, and for the past 30 years since he came to California he has always been interested in stock raising and owns the San Locus Ranch in Santa Barbara
3623 county, which is a mountainous stock ranch consisting of about 7200 acres.

That he is thoroughly familiar with the Malibu Ranch, having been over it a number of times, and that topographically the Malibu is very similar to his ranch, which consists of mountains, canyons, barrancas, level ground and some low land.

That he had been over practically the entire
3624 route of the proposed road through the Malibu Ranch, and was familiar with the facts; that the Malibu Ranch proper embraced within the purple lines shown on the map, Exhibit 6, is about 22 miles long, and that it is crossed by about 13 canyons at which bridges are to be constructed which will have sufficient clearance and be of sufficient width to enable cattle to pass to and fro; that he had as a matter of fact specifically examined the particular places where the bridges are to be located; that bear-

3625 ing in mind those matters and facts in his opinion as a cattle man and from his experience the placing of the proposed 40 foot road along the route contemplated would most decidedly damage the ranch.

That his reasons for his conclusions in that regard are that if you take any mountainous country and put a fence in some particular place and not put your fences expecting to turn
3626 cattle into a certain direction, it does damage that is incalculable almost because you are cutting off from the natural places to water the stock, you are cutting off large tracts of your pasture that make it a very serious thing; that stock when they feed in winter when they go to water they don't seem to be of the idea "we will go to water," but they drift to the water and drift away from the water; but if they are removed from water for a distance and there
3627 is no way for them to feed up to it and away from it and you start out to drive them two or three miles or a mile and a half to water, it isn't practicable; that it is not a practical stock ranch divided that way.

That in his opinion the Malibu Ranch as he has observed it and in its condition as he saw it is best fitted for stock purposes, and that stock purposes would be the ones for which it would bring the highest price on the market.

3628 That (after qualifying to testify as to values) in his opinion the reasonable market value of that portion of the Malibu Ranch from Marie Canyon to the Ventura county line owned by the Rindge Company, assuming that it was placed upon the market by the owner, not forced to sell, and purchased by a buyer willing to buy but not forced to buy, taken as a whole would be about $40.00 per acre; that this applies
3629 to the whole ranch, the company's portion and Mrs. Rindge's portion, and that taking those portions segregated it would be worth about the same.

That in his opinion the damage or detriment to the ranch by reason of the construction of a road of the kind and character proposed and described to him through the ranch taking the valuation on the basis of $40.00 per acre would be 10% or $4.00 per acre to both portions and
3630 to each; that the damage per acre irrespective of percentage would be about $4.00.

That the construction of the Alisos Canyon road as contemplated would damage the ranch as every road you put through a mountain country affects it as to stock raising.

Cross-Examination.

The testimony of this witness on cross-examination was substantially the same as that given by him on direct examination on the subjects covered by the direct examination.

Among other things the following question was asked him and he gave the following answer:

Q. In those portions of the ranch where your $500 a mile road would be constructed and the ranch thereby divided by the two roads into three portions, wouldn't there be more detriment than by the division of the ranch into two portions by the public highway? A. Well, I don't look at a road built as the road through the Rindge Company Ranch is at present as being particularly destructive or as a damage to the ranch. There is no fence. It belongs to them. They can cross at any time. They can exclude anybody they want to and that is a wonderful thing in a ranch. If the ranch is yours you are able to say who shall go on it and on it and who shall not. If you put a right of way through there, and the public has a perfect right to go into the ranch, it changes the aspect of it, and it changes your view toward it as no one knows until they begin to look at it that way.

The defendants then offered and there was received in evidence a deed dated January 15, 1892, by Henry W. Keller as grantor to May K. Rindge as grantee, whereby said grantor granted and sold to said grantee the whole of the portion of the Malibu Ranch (referred to herein as the May K. Rindge portion) which

3634 was located east of Marie Canyon, as shown on "Exhibit A" of the complaint introduced as an exhibit herein, which said deed contained the following reservation:

"Subject to a right-of-way to pass and repass over and along the private road now used in going to and from that portion of said Rancho Topango Malibu not hereby conveyed to the northern portion of said rancho from Santa Monica, until a public highway shall be estab-

3635 lished through the land hereby conveyed to take the place thereof."

It was then stipulated by all of the parties to these actions and agreed that the source of title of the Rindge Company and the source of title of May K. Rindge is the same, both deriving from Henry W. Keller, the Rindge Company not directly but by mesne conveyance.

PERRY A. HOWARD,

3636 recalled, testified:

Redirect Examination

By Mr. Anderson:

That assuming that the main road is built as proposed, the damage to the Rindge Company portion of the ranch by reason of the construction of the Alisos Canyon road in the manner proposed would be about 25 cents an acre, and if the main road were not constructed, but the Alisos Canyon road were, then the dam-

3637 age from such construction would be probably a dollar an acre.

G. E. GARDNER,

a witness called in behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Burnell:

That he lives in Los Angeles, and has for
3638 about 25 years; that his business or occupation is realty broker and appraiser. That he had been engaged in the business of realty broker and appraiser about 15 years. The witness testified fully as to his general experience in the valuation and appraisement of land. That in some appraisals he had acted on behalf of the county and in others on behalf of private owners; that he was acquainted with the ranch
3639 generally known as the Malibu Ranch; that he had visited that ranch about five times within the last four or five months for the purpose of familiarizing himself so that he might testify as to values in this trial; that he was acquainted with the location of the proposed public highway through the Malibu Ranch from the eastern terminus of Las Flores Canyon to the Ventura County line, and with the proposed road running from the road just mentioned up Las Alisos Canyon; that he had made a study of the prop-

3640 erty in question with a view of forming an opinion as to the value of the property as a whole also the value of parts of property to be taken, and determining whether or not the remainder will or will not be damaged. That the Malibu Ranch in general is a long strip of land extending for some twenty miles along, the coast and back to the summit of the hills probably three-quarters to one and one-half
3641 miles wide except at the widest point it is probably two and a half miles wide at Point Duma; that it mountain range land in the hills and on the mesas it is plow land; that in the valleys it is fruit and bean land, and alfalfa land. That he had handled lots of land, but don't know anything about soil. That he had familiarized himself with the value of land in different parts of Southern California. That he had formed an opinion as to the value of the land that is
3642 sought to be taken in these cases and had also formed an opinion as to whether or not damages would be caused to the remainder not taken by reason of the severance.

Mr. Burnell: I will ask you to start in at Las Flores Canyon and travel through the ranch and describe the property along the proposed right-of-way. If you have made any notes in your investigations, I presume there will be no objection to your using them.

Mr. Anderson: Not in the least.

3643 Mr. Burnell: You may use them.

Mr. Anderson: Those were notes made up by you and Mr. Allen and Mr. Crippen and Mr. Butterworth, or are they independent notes? A. These are notes I made on the ground, and they were typewritten here in Los Angeles.

Q. And Mr. Butterworth, Mr. Crippen and Mr. Allen were all along? A. Yes.

3644 Q. And each of you has a copy of the same notes? A. I think so.

Mr. Anderson: That is all I wanted to know.

A. The proposed right of way begins at a point on the east line of Malibu Ranch where the bridge crosses Las Flores Canyon. From this bridge to Coal Canyon the proposed right-of-way runs along a strip of beach land, averaging in width probably 250 feet. At Coal Can-

3645 yon a large rocky promontory projects towards the beach, on the east side; a small rocky head is on the west side; there is upper water in the upper reaches of Coal Canyon. We were on the ranch September 18th to 24th, I believe. I am not absolutely positive as to the date, but it is near that time. It is near that time, near the 20th, two or three days on either side of the 20th, 1918. From Coal Canyon to Malibu Canyon the proposed right of way runs along the beach land. This is a strip of beach that

3646 averages in width about 200 feet. There is a wharf and a warehouse on the beach strip, about one-quarter mile east of Malibu Creek. At Malibu Creek where the proposed right-of-way cuts a small two-room California house built of up and down O. P. boards, battened; also a small loading platform built of 2 x 12 O. P. The right-of-way crosses the railroad taking about 1,000 feet to the crossing. That is, it takes a thousand feet to cross there. This
3647 wharf and warehouse are fenced with a four-wire wooden post fence. Between the wharf and Malibu Creek the point runs down to the sea, and a sandy jetty runs out twelve hundred or thirteen hundred feet on which there is a small lake. There is a house and chicken corral on this spit. It crosses low land which probably overflows in the rainy season, taking a portion of a small portion of land now in
3648 corn.

Q. What in your opinion is the value of the beach land just described? A. I think $10 an acre was the value put on the beach land.

Mr. Anderson: I move to strike out the answer "probably overflows" as being indefinite and a matter of speculation.

The Court: In its form it does look like it is speculation but it may not be. There should be some elaboration to that statement. You

3649 stated it probably overflowed in the rainy season. What was the basis of that statement?

A. It lies very low, near the surface of the water line at that time in the creek. It looked like it overflowed in rainy weather. They had a crop of corn, probably Kaffir corn on it which they could get off before it overflowed and I inferred that it was overflow land. I am familiar with the appearance of the land that is subject to overflow, that I personally know
3650 to overflow. It looked to me to bear the same appearance. I have given the value of the beach land, $10 an acre. The beach land is now being used for nothing; the private road runs along there. Other than that there is nothing. The proposed right of way continues north, taking out a corral oval in shape, about 60 by 90 feet on the west side of a row of eucalyptus trees, then swinging west across
3651 Malibu Creek on a bridge. The land where this corral is located is fine but the strip is narrow. The land drops off into a creek bottom which is gravel and poor land, probably overflows. Of this beach land I was talking about, from Las Flores Canyon to Coal Canyon, I think it is three quarters of a mile and from Coal Canyon to Malibu is about two and a quarter miles. I have figured the acreage of this beach land, concerning this proposed right of way, but not the acreage of the balance.

3652 From Las Flores to Coal Canyon there is about 4,269 acres in the strip and the parcels, and there are four parcels between Las Flores Canyon and Coal Canyon. The acreage between Coal Canyon and Malibu Canyon—I can't give you exactly, for the reason that our arbitrary runs—crosses the proposed right-of-way just west of Malibu Creek. What I asked for would include the acreage in that portion that rounds
3653 the point there and runs through the cornfield and the corral there. I would say there is approximately seven acres in the forty foot strip and the parcels between Coal Canyon and Malibu point.

The creek bed or wash at the point of the proposed crossing is about 600 feet wide, thence continuing west the proposed highway takes a fence on either side of an old road, now there for a distance of about 300 feet. Both of these
3654 are hog tight fences. The land here is light, rocky and poor for about 300 feet where the right of way enters a patch of fine land, in corn, having a light crop on it; thence west through bean land for about 4,000 feet to where it meets the hills. The land was in beans where we were and we were informed that it had been in beans for a number of consecutive years, and that is the reason I called it bean land. Of this soil that I described as light rocky and poor, about 340 feet is taken by the proposed

3655 right of way. There are two parcels, one on each side. One contains .64 and another .59.

Q. What in your opinion is the value of the land you have just described as light rocky land, sought to be taken by the county in this case?

Mr. Anderson: I am going to object to that on the ground that it is not a proper way to arrive at the value of the 40-foot strip, to take two or three hundred feet of lineal distance and
3656 give a value on that particular thing; that is not the proper way to arrive at it. The value of real property in a parcel is its value in connection with the remainder, and the value is best and only properly ascertained as a whole, a continuity, without reference to a piece. For the purpose of cross-examination it would be proper, but not for the purpose of a general valuation of a given parcel. You might as well ask him how much this tree or that rock
3657 was worth, or any given body of land, and I wish to make that objection and have it understood that it goes to all that examination if the court rules against me.

Mr. Burnell: It will be so understood if the court rules against you.

The Court: Objection overruled.

(Exception No. 60)

That strip of rocky land was averaged with other land, at a valuation of $75 an acre. It was averaged with some good land on the east

3658 side of the creek, the land where the corn is planted, and the land where the corral stands, and the creek bottom land—land in the immediate proximity of this land. That land I have just described as being a portion of the general tract that I placed the valuation of $75 an acre on, extends from where the beach land left off to where the land cultivated to beans begins, approximately. That takes us down to this land I have described a moment ago, that
3659 is actually planted to beans.

Tuesday, December 3, 1918.

A. D. RUSSELL,

recalled in behalf of the plaintiff, testified in rebuttal as follows:

Direct Examination.

Mr. Burnell: I think it has already been testified that Mr. Russell is the owner of the
3660 Russell Ranch.

Mr. Anderson: Mr. Russell has qualified as a stock rancher.

Mr. Burnell: Yes.

Mr. Burnell: Is there any public highway running through the Russell Ranch?

The state highway from Los Angeles to Ventura and points north of that runs through his (the Russell) ranch; that under that highway on his ranch there are several openings about 6½ feet high by 4 or 5 feet wide; that

3661 he has seven or eight hundred head of cattle on this ranch; that the road has been there ever since he owned the ranch—about 36 or 7 years with these openings or passages under it; that his experience with regard to cattle passing through the openings is that it is hard the first time to get them through; but after that there is no trouble; after that they go backward and forward; you see them stringing down; there
3662 is no hurry; they become accustomed to it, graze as they go along after they get through the culverts if there is any feed.

"Q. Now from your experience as a stock raiser and owner of a stock ranch, have you been able, and have you formed any opinion as to whether a public road running through a stock ranch is a detriment or not? "A. Yes.

"Q. What is the opinion?

"Mr. Anderson: Objected to as incompetent,
3663 irrelevant and immaterial, no foundation laid. It is not shown that he has had any experience excepting on the one ranch.

"A. My opinion is that it is not a detriment to a ranch."

Exception No. 61.

"Q. Is it a benefit?

"Mr. Anderson: Objected to as leading.

"The Court: It is leading but I will permit it.

"A. I would say that it was a benefit to have a road through my ranch.

3664 "Mr. Anderson: Move to strike it out as not responsive.

"Q. Without regard to your particular ranch, but with regard to stock ranches in general, would you say that it was or not a benefit to have a public road through a stock ranch?

"Mr. Anderson: Objected to as no foundation laid.

"The Court: Objection overruled.

3665 "A. I would not think it was a detriment."

Exception No. 62.

"Mr. Anderson: Move to strike out the answer as not responsive.

"The Court: Motion denied.

"Mr. Anderson: He was asked if it would be a benefit."

Exception No. 63.

"Q. Assuming the ranch (Malibu Ranch) is of the shape shown on the map (Exhibit 6), and
3666 assuming that it is approximately twenty-one or twenty-two miles long, from the eastern to the western terminus, and of a width varying between half a mile at the narrowest point and approximately two miles at the widest point and the shape shown on the map, and assuming that a public road is laid out through that ranch as shown by the red line extending from Los Flores Canyon to the Ventura county line, as shown on the map, and assuming that the ranch is partly mountainous country, the mountains or

3667 hills being indicated by the way the contour lines on the map, and there is a considerable amount of level and low land to the south, and assuming that that ranch is used for stock-raising purposes to a considerable extent, there being in the neighborhood of a thousand cattle on the ranch and some sheep and hogs, would you say that the building of such a public road would be a detriment to the ranch?

3668 "Mr. Anderson: Objected to, no foundation laid and not sufficient elements contained in the question to enable the witness to answer it properly.

"The Court: I think the latter ground is good, particularly as to water.

"Mr. Burnell: I will ask you, Mr. Russell, to assume that at some of the canyons which are shown on the map, the names of which are printed, Corral, Puerco, Escondido, Latigo, Ra-
3669 mirez, Sosto, Zuma, and the other canyons on there, that in some of those canyons there is water above or north of the proposed road, and that in some of the canyons, and in other places, there is water south of the proposed road, but not north; and assuming further that there will be thirteen bridges crossed by the road where it crosses various canyons, and that under each of these thirteen bridges there will be an opening of larger dimensions than those you described as being under the bridges at your

ranch, then would you or not say that such a road would be a detriment to the ranch?

"Mr. Anderson: We renew the objection.

"The Court: I think there is one element that is essential, and that is the question of fences.

"Mr. Burnell: Further assuming that the proposed road will be fenced upon both sides, not in its entirety, but along such portions of it as will require fencing to keep the cattle off the road.

"Mr. Anderson: I object to that, if the court please, that it is not sufficient foundation, and particularly in this, that irrespective of any other question on the matter of fencing and now before the court, there is no evidence that the fence along the entire north side of the road will not be necessary. We don't contend it won't be necessary on both sides, but the evidence as it stands shows the absolute necessity of the fence along the north side; in other words, dividing the ranch by a fence.

"The Court: Not indicating what fences are necessary, or not necessary, the objection is overruled.

"Mr. Burnell: Now, assuming all the facts stated in my last two questions, would you, or would you not say that such a road would be a detriment to the ranch?

3673 "A. I don't think it would be a detriment to the ranch."

Exception 64.

The witness further testified that the highway through his ranch was used by automobiles; that if the cattle get on the road they are liable to get hurt, some of them by the automobiles; that their presence on the road does not frighten the cattle; that their passage over the bridges under which are the openings does not frighten
3674 the cattle; that he had never noticed anything of the kind; they soon get used to it; that you can hardly drive them away from an automobile if they do get used to them; that that is the trouble.

Cross-Examination.

The witness testified that upon his ranch they had both native and range cattle. That he couldn't tell how often he had observed the
3675 manner of the passage of those cattle backward and forward under the railroad. That he had been around among them when the autos have passed and all that. That they get so they don't care anything about it. That he is talking about the actual passage to and fro. That he has not seen all the cattle pass under; that he didn't stay long enough. That the road goes about three miles through his ranch. That he owns on each side. That the road cuts it just about in the middle, square in two. His ranch is just

3676 about square; the road goes through about three miles, the county road, the state highway. I mean the road traverses through the ranch about three miles; about three thousand acres on each side of the road of his ranch. His ranch is 6400 odd acres. That the canyons and ravines where this road crosses are not very deep. That the country through which this road passes is not mountainous; where the road is it is mostly
3677 level. That the openings are 4 or 5 feet wide by 6½ or maybe 7 feet high. That he has seen a herd driven through these. He has driven them through himself; three or four hundred in a herd. That he couldn't tell how many he has driven through. That it doesn't take very long to drive three or four hundred cattle through that narrow way. That they didn't have to go one at a time. That two cattle can go through a five foot opening, but very seldom they do
3678 through two; they generally go through one at a time of their own accord. That he never drove them through except the first time. He has probably done that once every year. They generally go themselves after starting. That he stayed there and watched them to see whether they went through. That he couldn't say that they all went through, because he didn't stay long enough. That they all had to go through, but not maybe when he was there, because of water. If they had not he would have known it

3679 very quick. The pasture was on both sides, but they generally fed on one side before the other, so it was feed that brought them back and forth. They went back and forth daily, because if they had not they could not have lived. That he didn't see them.

C. E. GARDNER,

recalled for further examination, his direct examination was resumed by Mr. Burnell, and he
3680 further testified:

That across Malibu Flat the road proposed runs through four thousand feet of bean land, two thousand feet of which was of the value of $500 an acre; the next 1500 feet, $400 an acre; that after passing this fifteen hundred feet, which takes you to Winter Canyon, the road proposed runs around the base of the hills for a thousand or twelve hundred feet, then climbs
3681 to the mesa on the east side of Marie Canyon, and for this strip was worth $15 an acre, it being badly washed pasture or grazing land; then for about 1000 feet over a rolling mesa of rocky soil that had been in hay, and through three or four hundred feet of bean field reaching to the east side of Marie Canyon, the rocky pasture being of the value of $15 an acre, and the bean strip, $200 an acre; that the land taken by the proposed road in crossing Marie Canyon, badly washed and very rough, was of the value of

3682 $20 an acre, which took the proposed road to the west line of the May K. Rindge property.

That the entire forty-foot strip through the May K. Rindge property contained 21.382 acres, valued at $2,267.37.

That parcels 1 to 20a, both inclusive, sought to be taken from the May K. Rindge property contained 4.485 acres, valued at $207.81.

(Wherever the witnesses as to value testified
3683 concerning value they gave their opinion as to the reasonable market value at the times to which their testimony was addressed, viz: in the Main Road case as of Sept. 30th, 1919, and in the Alsos Canyon Road case as of the date of the commencement of that action; but to save repetition, in transcribing or referring to their testimony the word "value" is used, but in the sense of "reasonable market value" of said respective dates.)

3684 This witness upon his futher direct examination testified *in extenso* and with much detail to the respective values of the 40 foot right-of-way strip and of the various parcels sought to be taken and condemned through the Rindge Company portion of the Malibu Ranch in the Main Road case, segregating this strip and these parcels into numerous sections corresponding with the nature and character of the land that was embraced in such sections, in the same manner that he segregated the strip and parcels in the

3685 May K. Rindge portion, giving the acreage of each section, the value per acre of each and the value in dollars and cents of each. These segments or sections were designated by the witness as "arbitraries."

He further testified that where the right-of-way crosses Walnut Canyon there was a small running stream, and two watering troughs on the south side of the old road supplied by a pipe from springs further up the canyon; that these
3686 troughs are to the north of the proposed right-of-way; that there is a four barbed wire fence on steel posts on the northwest side of Walnut Canyon which leaves the three troughs to the south, or outside of the fence; that the proposed road drops into Trancas canyon through a strip of pasture land, the right of way crosses Trancas Canyon and Trancas Creek to the south of the wind-mill, leaving the watering trough on the
3687 north side. This wind-mill and trough are south of the present road, which has a fence on the north side; that Lachusa and Los Alisos, Encinal, Solstice, Corral, Malibu, Carbon, Escondido canyons have running water, and that there is a cienega between Escondido and Ramirez with water in it.

That the forty-foot right-of-way strip through the Rindge Company portion of the ranch contained 78 acres of the value of $6,438.91; that the various parcels in that portion contained

1233

3688 39.70 of the value of $1,278.77; that the total value of all of the property sought to be taken from that portion of the ranch in the Main Road case (to which all of this testimony refers) was $7,717.68.

He further testified, both as to the May K. Rindge portion and as the Rindge Company portion, that neither would suffer any severance damage, in his opinion, from the taking of the
3689 right-of-way strip, and the sundry parcels sought to be condemned in the Main Road case.

His total valuation of all of the property of the Hueneme, Malibu and Southern railway proposed to be taken in the Main Road case was $138.92, with no damage to the remaining property of that company by reason of severance.

Certain photographs which the witness testified correctly represented certain views along the proposed right of way of the main road, con-
3690 taining on the back of each a description of what each represented, were offered and received in evidence without objection, and marked Plaintiff's Exhibits J-1, 2, 3, 4, 5, and 6, respectively and are among the exhibits in the Main Road case to be certified up by the clerk pursuant to stipulation.

The witnesses valuations as to the property sought to be taken for the Alsos Canyon road were as follows: Forty-foot strip right-of-way, 8.099 acres, at $15 an acre, total $121.48;

3691 Parcels, 18.181 acres, at $15 an acre, total $272.70.

That assuming that the proposed road up the Los Alisos Canyon will be fenced wherever a fence is necessary, he thinks that the remaining property of the Rindge Company will not be damaged by reason of the severance therefrom of the portions thus taken for the road.

That the proposed road, where it passes
3692 through a corral near Malibu Creek, does not take or trench upon a Fairbanks-Morse weighing scale.

Certain pictures showing views of the proposed Alisos Canyon road were put in evidence, and marked Plaintiff's Exhibits K-1 to K-6, both inclusive, and are among the exhibits to be certified up by the clerk.

Cross-Examination.

The cross-examination of this witness largely
3693 brought out testimony in substance and effect the same as that given on his direct examination.

He testified that as a matter of fact he had never had an opportunity afforded him, in the last five to eight years of observing the effect upon cattle of a fenced road cutting their range in two, except his personal observation in driving through stock highways on fenced roads; that he never stopped to observe the habits of the cattle in going to and from water or grazing

3694 up to water and back, and that his observation was nothing more than the appearance of the cattle on either side of the road without reference to their general movement in feeding; that he himself had not been in the stock business, but that he has an uncle who has been in the stock business for twenty years with whom he had visited and talked three or four times a year; but that he had never gone out to watch the stock or study their habits.

3695 He also testified that his reasons generally for his opinion that the segregation of the ranch by the construction of the contemplated roads through it in the manner proposed would not be a damage or detriment to the ranch were because he believed that the ranch placed on the market with this road running through there on both sides would bring more money and find a readier market than it would now; and that in

3696 so testifying he was assuming that the purposes for which it was then being used were the purposes for which it is best adapted. That in making his valuation which he has testified to, both on the May K. Rindge portion and the Rindge Company portion, he took into consideration the fact that in many places these roads intersect and cut into small portions of land. That he didn't add anything to his value by reason of the segregation. That his values are absolutely free from any consideration of segregation.

3697 That he doesn't believe they are hurt at all. That he placed a value on the land that he thought was proper, without regard to any segregation. That his valuation, or the valuation which he put upon it in the condition in which he found it is irrespective of whether the road is built or not. That he has not increased his value because he thought there might be a possibility of damage by reason of the construction of a fenced road. That he doesn't think the added difficul-
3698 ties of turning where the fences cross would damage the land. That he took that into consideration. That the knowledge which he has of the matter of interference of that kind, is that he knows of many long narrow strips of land being cultivated similar to these strips. That the narrow strips which he refers to are narrower than this narrow strip will be on the Malibu Ranch. That they are being cultivated
3699 and he believes that these can be conveniently cultivated too. That if those narrow strips which are narrower than those on the Malibu Ranch were again cut in two, it would depend on the width of them whether or not that would interfere with cultivation. If it took three quarters of them for the road, it might. If you ran a straight fence through them so you had to turn when you come to that fence, it would make it harder to cultivate. That you could plow the long way. That he doesn't think it

3700 would add to the expense of cultivation. That in his opinion, these strips will not be damaged by having a road through them. That he doesn't think the cost of cultivation would be increased by it.

The witness futher testified that he had made a rough estimate of the reasonable market value of both the May K. Rindge and the Rindge Company portions of the ranch as a whole, which valuations were as follows:

3701 Total value of the May K. Rindge portion, $89,900, segregating it into 150 acres of bean land at $200 an acre, $30,000; 90 acres of bean land at $300, $27,000; 5 acres of lemon groves at $1000 per acre, $5000; 50 acres of barley land at $50 per acre, $2500; 20 acres around the home place in ornamental trees and shrubs at $100 an acre, $2000; 1535 acres of mountain range at $15 per acre; $22,950; 15 acres of beach

3702 land at $10 per acre, $150; total, 1900 acres, $89,950. That the method he used in arriving at his figures of the value of this ranch is a usual and absolutely proper method by which to estimate the value of an entire tract; that, in other words, it is a usual and proper method to take a segregated piece and estimate the value for specific purposes for the sake of finding out what they will produce independent of their value in relation to each other.

3703 Total value of the Rindge Company, $51,000, segregating it into 8700 acres of grazing land at $15 an acre, $130,500; 1300 acres of bean land at $200 an acre; $260,000; 25 acres of alfalfa land at $350 an acre, $10,500; 1000 acres of hay land, at $50, $5000; 25 acres of alfalfa land at $350 an acre. That the $200 an acre for the 1300 acres of bean land is just an average price placed on the 1300 acres. That this is a calcu-
3704 lation for estimating the income and that he put it in at this price for that purpose. That this is just a lead pencil memoranda for the purpose of arriving at the probable income value.

That the lead pencil memoranda which he used in answering questions as to the value of the various portions of the May K. Rindge and Rindge Co. property does not purport to be full and complete, but is just a rough memoranda, complete as far as they go. That he figured
3705 that the income would be 8½% net on $90,000 for the May K. Rindge property, and 6% net on $451,000 on the Rindge property. That assuming that the main road, that is, the one from Los Flores to the Ventura county line, and that the Los Alisos Canyon road running from the northern boundary of the ranch to its intersection with the main road near Lachusa, are fenced, that would not make any difference as to the matter of damage by segregation. It makes no difference in the market value of

3706 the property. If it made any difference in the market value of the property for the purposes for which it is now used, it would benefit it, and that is for the purpose for which it is used now and on which I calculate its values. That assuming that there are runways for cattle under the proposed Los Alisos road, he doesn't think it would make it more difficult to handle the cattle. The cattle could work their way back and forth through the runways.

3707 *Redirect Examination.*

The witness on redirect examination testified that the automobiles in which he and his associates drove through the Malibu Ranch while they were there for the purpose of valuing the property had no effect on the cattle, except that they sometimes had to slow down and wait for them to get out of the way and sometimes had to drive them out of the way; that they saw and

3708 passed many cattle near, along and upon the ranch roads; but that they didn't pay any attention to the passing automobiles at all.

In addition to the witness Gardner, the plaintiff called three other real estate and appraisement experts, each of whom qualified as opinion witnesses on the issues of damages, both as to the matter of the lands sought to be taken in the right-of-way strips and the contiguous parcels, and upon the issue of damage by reason severance due to such taking, and the value of the improvements to be taken.

3709 These three witnesses were,—

E. S. BUTTERWORTH,

ROBERT M. ALLEN, and

PAUL A. CRIPPEN.

Each gave testimony substantially to the same effect and in the same manner as to detail and segregation into parcels or "arbitraries" as the testimony given by Mr. Gardner.

3710 Their valuations were respectively as follows:

E. S. BUTTERWORTH.

May K. Rindge Portion:

Forty-foot right of way strip, $2,254.82; side parcels, $228.57; improvements taken, $153; May K. Rindge portion as an entirety, $182,000.

That in his opinion the remainder of the land of the defendant, May K. Rindge, will not be damaged by reason of the severance therefrom of the land sought to be taken in this action;
3711 not in addition to the values that he has put upon the land. That he has given the values of what the county seeks to take, and that he thinks the remainder will not be damaged by the taking.

Rindge Company portion:

Forty-foot right of way strip, $6438.91; side parcels, $1,278.77; improvements taken, $1,234.50; Rindge Company portion as an entirety, $413,475.

3712 That in his opinion the remaining property of the Rindge Company will not be damaged by reason of the severance therefrom of the portions sought to be taken in this action.

That the reasonable market value of the property of the Hueneme, Malibu and Port Los Angeles Railroad Company taken by the proposed main road is $138.92. That this includes the parcels. That in his opinion the alleged right
3713 of way of the railroad company not sought to be taken will not be damaged by reason of the severance therefrom of the parcels sought to be taken. That the value of the platform of the railroad taken is $15.00."

That the May K. Rindge portion consists of about

20 acres of beach land at $50 an acre $ 1,000
35 " " " " " $10 " " 350
10 " " " " " $25 " " 250
3714 500 " at Malibu Flat " $300" " 150,000
40 " of bean land " $200" " 8,000
1325 " " pasture land " $15 " " 198,750"

That the Rindge Company portion of the ranch consists of

8,675 acres of pasture land at $15 an acre, $130,125.
125 " " alfalfa " " $250 " " 31,000.
1,000 " " barley " " $50 " " 50,000.

3715 1,335 " " bean " " $150 " "
200,250.
235 " " beach " " $10 " "
2,350.

That he didn't use the assessed value in figuring his values on the property because he certainly would not, in this case, consider the assessed values were absolutely correct. If they were, it would be very simple to get at the value
3716 of all kinds of property in the country

That in his opinion the highest use to which the Malibu Ranch could be put would be for the raising of lima beans on the portion available and stock for the balance, in the mountains. By the highest use he means the use of the property which would afford the greatest financial returns. That the purposes for which he thinks the property best adapted are also the purposes for which he thinks it will continue to be best
3717 adapted in the immediate future.

The specific valuations were in the Main Road case.

Los Alisos Canyon road, 40 foot strip, $121.48; parcels, $151.22.

That in his opinion the remaining property of the Rindge Company will not be damaged by reason of the severance therefrom of the land sought to be taken for the Los Alisos road.

That as to the opening or construction of the road through the May K. Rindge portion of the ranch, and as to the opening or construction of the road through the Rindge Company portion of the ranch, also as to the opening or construction of the road at the points where it impinges upon the railroad right of way, that in his opinion the opening or construction of this road or these roads, also as to the roads to the west, would not be any detriment to the parcels remaining, or, in other words, that the remaining parcels of land would not be damaged by reason of the segregation. That the reasons for that opinion are, in the first place, it is absolutely necessary, in order that the ranch should be of any value whatsoever, to have a road leading to it or from it. The road as it exists now, while it is not entirely followed by the new road, does follow in some instances what is deemed at least to be more advantageously located on account of, or for reasons of permanent upkeep. That he means the new road as proposed. That he means permanent upkeep by the county. That inasmuch as a road has to be there to give any value at all to the ranch commensurate with its worth, it is, of course, advantageous to have a road where the upkeep would be reduced to the minimum. That he assumes that there would be quite an item of upkeep to the road as it is located now, even for the purpose for which

3721 the road would be used now. That he bases that assumption upon knowledge of the general conditions at the foot of mountains. That he knows there is water coming down and it certainly must wash across the road,—the road that is there now. That that applies to the road on the May K. Rindge portion as well as on the Rindge Company portion. That the agricultural land, that land that can and should be, in order to get its highest value, devoted to
3722 the raising of beans or barley, principally beans, would necessarily need a road to it, which would have to be located either along the edge or along some place on the mesa, and it would be impracticable, in fact, impossible, to follow the ragged edge right on the edge of the bluff all the way along. So that there must be a severance—in order to maintain a road of any kind on the property, there must be a severance and the
3723 severance would not be any greater in the event of the new road than in the event of the present road or any other road that he would consider would have to be maintained. That another reason is the relief from the maintenance of the road. That he is aware that from Solstice or Sosto Canyon to Ramirez Canyon there are a number of fields in cultivation. That this proposed road neither touches nor runs through any part of those fields until it gets a short distance this side of Ramirez. That the same rea-

3724 sons for the road at that point did not prevail. That the element of engineering is a feature that enters into it there. That if there are any reasons why a road could not be maintained advantageously on the mesa opposite the canyon it would be better to divert it. That he has been over a very good ranch road, over the mesa, maintained by the Rindge Company. That it is not difficult to travel. That it is a very
3725 good road, with the exception of a few canyons that have to be crossed. That the reasons which he has given do not apply to the road from the ranch line on the north down to where it intersects the main road in so far as its damaging or not damaging the ranch is concerned. The reason that he has for his opinion that that road would not damage the ranch is the fact that the canyon there is so steep that in his opinion no cattle would cross the canyon. That he
3726 didn't know of any other canyon so steep. That he doesn't think there is any point on the west side between Los Alisos Canyon, from the point where the road starts until it reaches the main road at Lachusa Canyon that the cattle could cross.

That in arriving at his figures he considered these values which he has given on these various parcels, in connection with the ranch as a whole. That in considering them that way he considered the purposes to which the ranch is now

3727 being put, as well as the purposes to which it could be put.

ROBERT M. ALLEN.

May K. Rindge Portion:

Main Road Case:

Forty-foot right of way strip, $2,417; side parcels, $228.57; improvements taken, $168; May K. Rindge portion as an entirety, $182,000.

That in his opinion the remaining property of
3728 Mrs. Rindge will not be damaged by reason of the severance therefrom of the property sought to be taken.

Rindge Company Portion:

Main Road Case:

Forty-foot right of way strip, $6,456.19; side parcels, $1,278.77; improvements taken, $633.25; Rindge Company portion as an entirety, $415,000.

3729 That in his opinion the remainder of the Rindge Company's property not taken will not be damaged by reason of the severance therefrom of the portion which is sought to be taken.

Los Alisos Canyon Road: same as Butterworth.

That in his opinion the remaining property of the Rindge Company will not be damaged by reason of the severance therefrom of the property sought to be taken for the Los Alisos road.

That in his opinion the reasonable market value of the land within the 40 foot strip which

3730 is taken from the right of way of the Hueneme, Malibu and Port Los Angeles Railroad Company is $131.23
That the value of the parcels is..... 7.69

Total $138.92

That the remaining portion of the alleged right of way of the Hueneme, Malibu and Port Los Angeles Railroad Company not sought to be taken will not be damaged by reason of the
3731 severance therefrom of the portions that are sought to be taken.

That in his trips through the Rindge Ranch he has observed cattle. That he has had occasion to travel over the roads on the Malibu Ranch in an automobile. That every day that he was up there he traveled some part of the day in a machine, either coming back or going to the location that he started to work from. That the automobile passed near cattle on these
3732 occasions. That sometimes they would be lying down in the road. That when the automobile approached or passed them it had no effect upon them. That they would get up sometimes, and that he would make some of them get up when they were lying down. That all of them would not get out of the way until they were urgently requested to do so, but some had to be roused; some of them had to be prodded up. That he didn't find that any of them showed any sign of fright at the automobile. That he has traveled

3733 in an automobile over public roads and over roads that went through other ranches on which there were cattle, and that he has passed near cattle. That he never noticed any great fear of cattle. Some would be a little more frightened, possibly. They don't pay any attention to an automobile any more. That he has observed cattle upon the road itself outside of the Rindge Ranch. That the automobiles didn't seem to have
3734 any effect upon them at all; they didn't frighten them. That none of them seem to be pale or worried looking.

That the property of May K. Rindge consists of 20 acres of beach land at $50 an acre .....$ 1,000
35 acres of beach land at $10 an acre 350
10 " " bean " " $250" " 2,500
500 " " at Malibu Creek at $300 an acre 150,000
40 " " bean land at $200 an acre 8,000
3735 1325 " "pasture land at $15 " " 19,875

That the acreage is rough estimate, but that the values are correct.

That the Rindge Company's portion of the land consists of
8700 acres of pasture land at $15 an acre.$13,050
125 " " " " " $250" " 31,250
1000 " " barley " " $50 " " 50,000
235 " " beach land " $10 " " 2,350
1500 " " bean " " $150" " 225,000
500 " " best bean " " $300" " 150,000

May K. Rindge Portion:

Main Road Case:

Forty-foot right of way, $2417.37; side parcels, $228.57; improvements taken, $261; May K. Rindge portion as an entirety, $108,380.

That in his opinion the property of May K. Rindge which is not sought to be taken will not be damaged by reason of the severance there-
3737 from of the land which is sought to be condemned. There is no damage to the May K. Rindge ranch provided a proper fence is put in. That is, I am assuming that the road will be fenced.

That the items making up the total value of the May K. Rindge portion of the ranch consists of 5 acres, lemon grove, at $2,000 an acre ..... $ 10,000

60 acres bean land, Malibu Flat, at $500
3738 an ac. 30,000

30 " " " " " " 400
" " 12,000

150 " " " " " " 200
" " 30,000

1692 " grazing land and beach land at $15.00 an acre..... 25,380

Part of it improved by eucalyptus trees 1,000

$108,380

3739 Rindge Company Portion:

Main Road Case:

Forty-foot right of way strip, $6,438.91; side parcels, $1,278.77; improvements taken, $1393; Rindge Company portion as an entirety, $413,-420.

That in his opinion the remainder of the Rindge Company's property which is not sought to be condemned will not be damaged by reason
3740 of the severance therefrom of the portion which is sought to be taken, if it is fenced where necessary and gates put in.

That the elements entering into the total value of the Rindge Company's portion of the ranch are:

90 acres of bean land (Corral) at $180 an acre	$ 16,200
50 " " " " (beyond Escondido) at $200 an acre	10,000
3741 150 " " " " (Ramirez) at $200 an acre	30,000
100 " " hay " " 50 " "	5,000
1000 " " " " (Zuma) " 50 " "	50,000
450 " " bean " (Trancas) " 175 " "	78,500
300 " " " " (Encinal) " 150 " "	45,000

3742 30 " " alfalfa (Los Alisos) 350 " " 10,500

50 " " bean land (just beyond Los Alisos) at $180 " 9,000

15 " " hay " (just beyond Los Alisos) " 50 " 750

100 " " bean " (Nicholas) " 150 " 15,000

75 " " " " (Sequit) " 100 " 7,500

3743 25 " " " " (just this side of Ventura county line) at $100 an acre 2,500

8900 acres pasture land at $15 an acre. 133,500

Los Alisos Canyon road; same as each of the other witnesses of the plaintiff on values.

That assuming that the Los Alisos road is constructed, the property remaining would not be damaged by reason of the taking of the lands necessary for the roads.

3744 That the reasonable market value of the property of the Hueneme, Malibu & Southern Railroad included within the 40 foot strip taken is $131.23

That the value of the parcels taken is.. 7.69

Total $138.92

That the value of loading platform taken is 15.00

That the remaining portion of the so-called right of way of the railroad would not be dam-

3745 aged by reason of the s verance therefrom of the parts sought to be taken.

The witness

PAUL A. CRIPPEN,

on his

Direct Examination,

after having testified to his familiarity with certain ranches, testified:

"Those are the only ranches that I am fa-
3746 miliar with enough to make a comparison with the Malibu. I might add, if I might be permitted, that there is no ranch that I know of similar to the Malibu except in some minor features;"

It is a fact that almost all ranches differ; so much so that it is almost futile to compare them at all except in a general way as to the area and what they will produce. You have to make an
3747 individual study of each piece of property. Each ranch is a different proposition entirely from any other property.

On his

Redirect Examination

the following transpired:

By Mr. Burnell:

Q. You have been on stock ranches and seen cattle and observed what they were doing and how they acted?

A. Yes.

3748 Q. In arriving at the various opinions which you have arrived at as to the values of the different portions of property in the May K. Rindge portion, have you considered the highest use to which in your opinion those various pieces of property may be put?

A. I have.

Q. Does that apply to all of the property?

A. Yes.

3749 Q. What, in your opinion, is the highest use to which the property of May K. Rindge can be put now or in the immediate future?

A. A general ranch. It is suitable for the raising of all the things that they are now raising, lemons, hay, grain, beans and stock.

Q. What have you to say with regard to the Rindge Company property, as to the purposes for which it is best adapted?

A. I think it is being put to the best use at 3750 this time. I mean by that that the crops and things which are being raised and produced are the most appropriate things for that property.

That on his various trips through the Malibu Ranch, he has observed the cattle. That he has traveled over it in automobiles. That the automobiles had no effect upon the cattle. That they didn't seem to be frightened. That they didn't look worried. That some of them were right in the road, laying down in the road, and once or twice they had to get them up and get them out

3751 of the way so that they could pass along. That they didn't stampede at all. That they had to be shooed out of the way. That he had been on other ranches where cattle and stock were kept. That on some of those occasions he had traveled in automobiles. That he has passed near the cattle. That the passage of the automobile didn't have any effect upon the cattle. That they didn't appear to be frightened, or
3752 worried, or express alarm in any way.

That a public highway, as an improvement, increases the value of land in its vicinity.

That on the various ranches where he had been and examined and investigated and studied, he has found roads running through them; either public or private. That there was stock on some of them. That the public roads were fenced, and some of the private roads were fenced in the fields. Along the private roads
3753 there would be fields that were fenced off. That is, where the road passed alongside of a field, the road would be separated from the field by a fence, or where it was advisable to have the ranch divided up into several fields or sections for the handling of stock or to keep stock out of fields that were improved and growing various things, they would be fenced off. That the cultivated land on the Malibu Ranch, where the fields or portions of cultivated land are cut by the proposed main road, in his opinion it might,

3754 in two or three instances, make some slight inconvenience in the matter of cultivation, but he doesn't see how that inconvenience could be reckoned in any appreciable amount of money. That he thinks it is more inconvenient than the damage to the value of the land. That he thinks the value of the land is not diminished. By inconvenience he means that it is a matter of personal inconvenience to the man who happens to be handling the plow, but he doesn't think that
3755 it would result in any depreciation of the value of the property by reason of the severance, and that it would be so small that it would not be reckoned in money.

By Mr. Burnell:

Q. I believe in answer to some questions you testified that you had appraised several ranches for stock ranches having roads through them. A. Yes.

3756 Q. What did you observe was the effect of those roads on the value of the ranches?

Mr. Anderson: Object to that as immaterial unless it is shown that he knew the method in which the ranch was being used and how the stock crossed and recrossed.

The Court: I think so; the conditions might be entirely different. Objection sustained.

Q. On any of those ranches were the roads that ran through similarly situated with regard to the ranch itself as is the proposed Malibu road with regard to the Malibu Ranch?

3757 A Juror: When you considered this land, did you consider it a stock ranch or grain ranch?

A. As a mixed ranch, general ranch.

A Juror: Do you consider it a grain ranch or a cattle ranch? Do you consider that a stock ranch? A. Not as a stock ranch, no.

A Juror: Would the value be improved by a roadway through there? A. It will, yes sir.

A. That is such a general question, I don't
3758 believe I can answer it. They had roads running through them, to them and along side of them, but as to running through in a similar manner—

Q. By that I mean did any of the roads through the ranches, from one part to another, crossing the ranches, dividing it into two sections? A. Yes.

Q. Did you observe how cattle crossed from one side to the other? A. I didn't observe them
3759 driving them across.

Q. Did you observe them going across? A. No.

Q. What, in your opinion, was the effect of those roads which cut the ranch in two, what effect did it have upon the value of the ranch?

Mr. Anderson: Objected to as incompetent, irrelevant, and immaterial; no foundation laid.

The Court: Objection overruled.

Mr. Anderson: Those questions are not in issue.

3760 The Court: It is simply for illustration.

A. A good road or highway—

Mr. Anderson: Now wait a minute. We object to the form of the answer.

The Court: Yes. You see, that is the evil of this line of testimony.

A. The roads on those ranches, or the effect of the roads, are beneficial.

The Court: That is not responsive. Read
3761 the question.

(Question read.)

Q. Have they made the market value less or not? A. Increased the market value.

Exception No. 65.

A Juror: When you considered this land, did you consider it a stock ranch or grain ranch? A. As a mixed ranch, general ranch.

A Juror: Do you consider it a grain ranch or a cattle ranch? Do you consider that a
3762 stock ranch? A. Not as a stock ranch, no.

A Juror: Would the value be improved by a roadway through there? A. It will, yes sir.

G. E. LEWIS,

recalled on behalf of plaintiff in rebuttal, testified:

That he had farmed all of his life; that he was 61; that he owns a ranch on the state highway between Los Angeles and Ventura—a farming and stock ranch altogether; that he has about

3763 a hundred head of stock on that ranch, cattle, horses and mules; that he has carried two or three hundred head, and is familiar with the business of stock ranching; that the state highway runs right through his ranch.

Q. From your experience in the stockraising business have you been able to form an opinion as to whether or not a public highway running through a stock ranch is a detriment or not?

3764 This was objected to by the defendants on the ground that it is too general; that the mere question of running through a stock ranch without giving the location and conditions is utterly immaterial.

The Court: That is for cross-examination. Overruled.

A. I have.

Exception No. 66.

Q. What is that opinion?

3765 Mr. Anderson: Same objection.

The Court: Overruled.

A. It is not.

Exception No. 67.

This witness further testified that he had been on the Malibu Ranch; and that the ranch would not be damaged, in his opinion, by the proposed right of way in the Main Road case passing through it; that there is one opening under the highway on his home place; that he has observed whether cattle, horses and other stock pass under

3766 the road through this opening; that they go through voluntarily from one field to another, after being driven for a time or two; after that there is no trouble at all; that many automobiles pass on the state highway; that he never observed any particular effect upon the cattle and other stock by reason of the automobiles; that he had not exactly been in a position to observe the cattle when automobiles were passing; but if the automobiles scare them at all, it is the
3767 noise of the concrete; that so far he has not found that the automobiles on that road have any bad effect on the cattle; that it has not prevented them from passing and repassing through the opening; that that road with the openings under it passing through his ranch has been there over three years. That he had another one there that the county put in about five years before this one. That it had no effect
3768 whatever upon the cattle passing, the same as the one on the highway. That there had been another culvert or opening; that he didn't think that he found that his cattle have become poor or lost weight on account of any passing through the openings.

Cross-Examination.

On cross-examination he testified that his cattle were Holstein and Jersey; dairy stock; if properly treated, tame cattle, not what are known as wild range cattle. That he has about

3769 600 acres of the home place, and rents about 6000 acres.

Redirect.

That he had had about 400 head of range cattle belong to a neighbor, most of which ran back and forth, and went through the culvert, with very little trouble about it. That the cattle had to go under the culvert to get water.

J. C. PATTON,

3770 recalled, by consent, on behalf of defendants, testified:

That since last on the witness stand he had investigated the location of certain living springs which he, at that time, thought were in Marie Canyon; that he found that they were located in the canyon just west of Marie, known as Puerco; that the springs in question are above, to the north of, the proposed highway some
3771 fifty or seventy-five yards; that during the dry season those springs do not flow down south of the proposed highway; that there are no springs in Marie Canyon near the proposed road; that he had examined Marie Canyon since on the witness stand, and that it was dry to the bottom; that the springs he spoke of were then running; but that was a condition which did not continue in the dry season.

3772 *Cross-Examination.*

That he examined Marie Canyon for the purpose of finding if there was water, some half mile or above the forks of the Marie.

C. H. FULLER,

a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified:

That he was in the cattle and Pioneer Truck business; that he had been in the cattle business
3773 45 years; that they owned the Pioneer Ranch Co., at Corona, a couple of thousand acres; have a ranch in Mexico, and one up toward the Santa Anita Ranch leased, of about 16,000 acres; that the Mexico ranch was about 500,000; a ranch known as the Jalma, of about twelve or thirteen thousand acres; the San Marcus ranch of 42,000; and six or seven ranches in Arizona; that they have nearly 30,000 head of cattle or
3774 better; that all of these ranches except the Santa Anita have public roads through them.

Q. Assuming that the territory enclosed within the light purple line on the map (Exhibit 6) to the north of what is denominated Pacific Ocean, is the Malibu Ranch; assume that on the northern part of the ranch adjoining the purple line extending down toward the ocean where you see the contour lines on the map, assume that there are hills and mountains ranging from a few hundred feet to a half mile back from the

3775 ocean back toward the purple line; assume down toward the ocean along practically the whole strip of the ranch there are mesa lands; assume that cutting this ranch, down through it, at various points, there are canyons and barrancas; assume that there is a public road built from the eastern end of the ranch upon the line which is red upon the map going the full length of the ranch; assume that the road is fenced wherever
3776 necessary; assume that at thirteen different canyons as the road goes through the ranch there are bridges over the canyons with a clearance of seven feet, in width from six feet; assume that the road is twenty-two miles long; assume that the ranch varies in width from a half a mile to perhaps two and a half miles; assume that upon that ranch there are about one thousand head of cattle. Have you an opinion as to whether or not the building of that road upon
3777 the approximately red line that I have indicated would be, or would not be, a damage to the ranch as a stock ranch?

Mr. Anderson: We object to that, if the court please, on the ground that there is no foundation laid; on the ground further that the question does not contain sufficient elements; on the further ground that the question of necessity of fencing is to some extent left to this witness; who has no knowledge of the situation,

3778 and cannot pass on it—"fences where necessary."

The Court: Do you desire to examine him on the *voir dire?*

Mr. Anderson: No, not at all; I simply make that objection.

The Court: Overruled. Now, the question is, Mr. Fuller, whether under that assumption of facts you have an opinion. That question must be answered by yes or no.

3779 A. Yes.

Exception No. 68.

Mr. Vallee: Now, what is that opinion?

Mr. Anderson: We object to that on the same grounds.

The Court: Same ruling. Overruled.

A. Well, my opinion is that I think it would be a benefit if it was properly fenced as a road.

Mr. Anderson: Wait a minute. He didn't

3780 ask for any reasons.

The Court: What was that last statement?

(The last answer read by reporter.)

A. Culverts to let the stock go underneath, where they can reasonably get to water. I have several of those things—

Exception No. 69.

The Court: Wait a minute.

Mr. Anderson: Just a minute. I move that that be stricken out.

The Court: Stricken out.

3781 The witness further testified that he did not know that he could tell just then whether or not on the public roads crossing his ranches bridges were provided for cattle passing through from either side; that they had several of them on some leased lands where they used them that way, but took them out—bridges underneath which cattle passed; that he observed no effect upon the cattle from the fact that they had to go
3782 to and fro under such bridges; that after they went through once they would go freely; that water was on one side of the road only, so that if they didn't go under the bridges they would get no water; that when they went over they had to go back to the other side to pasture; that did not have any bad effect on or reduce the weight of the range cattle.

That automobiles passing over those bridges had no effect upon the cattle that he had no-
3783 ticed; that he never had observed cattle going to sleep under the bridges.

Cross-Examination.

On cross-examination by Mr. Newby the witness testified:

That the Pioneer Ranch near Riverside or Corona had about 2000 acres; that it has public roads through it. That it used to be nearly all one ranch, with a road on one side of the ranch for about three or four miles. Then there was one road about three-quarters of a mile. Then

3784 they wanted a road on North Main street and he gave them a right of way through there; they then wanted another road about a half a mile from there and he gave it to them. That they keep stock on the ranch; that they have had as many as 4500 head, and once as many as 5500; that they were young stuff, range cattle brought in mostly from Arizona to keep them from dying; that there was water all over this
3785 ranch; the road was fenced with barbed wire and railroad posts; that the method of taking the cattle across the road was through gates; that there were no bridges or culverts. That the cattle are passed by driving them through the gates. That upon lands that they had leased, there were roads where there were culverts or bridges requiring the cattle to be passed under. That they took them out because they lost the lease, not because they desired to take them out.
3786 They lost the land and didn't have any more use for the bridges. That there were fifteen or twenty thousand acres there. That when they were conducting that portion of the ranch they didn't have water on both sides of the road, but only on one side. That the cattle had to pass from one side to the other, under a passage way about six or eight feet wide. That they passed under that. He didn't remember how many cattle there were, but there must have been seven or eight or nine hundred; only one bridge,

3787 about eight or ten feet long, and he did not think it exceeded over six feet high, five or six feet. At some times it is difficult to get them through the first time. That they had cattlemen in charge of the stock on that ranch.

Q. Now, passing these cattle through the gates requires some cost and expense, does it not? A. Well, you have to round them up and drive them across the road, a 60 ft. or 40 ft. 3788 road, and have a man on each side.

Q. If the road had not been fenced there would have been nothing to have prevented the stock from running at will over the ranch? A. No.

Q. Do you, as a stock man, regard that as some advantage? A. Well, it might in one way. I consider the road worth more than what five or ten minutes' work in driving across the road is worth.

3789 Q. Is that true with reference to the question propounded by the counsel for plaintiff? Is that the reason you say it would not be a damage, that the road would more than compensate, is that what you mean? A. That is the way I look at it.

Q. You do think that if the ranch were considered as a separate and independent proposition and was not on the market for sale that it would injure it as a stock ranch to have a fenced road through the middle of it? A. Well, do

3790 you mean a road through the stock ranch in the center of it?

Q. Yes. A. If it was not for sale?

Q. Yes. A. Well, I don't know about that. If it was my ranch I would consider a road pretty valuable through it.

If he had a stock ranch he would want roads through it and fenced; that he thought it would add to the value of the ranch for stock purposes, because they had to change stock all the time
3791 anyway in different fields; that every stock man in the country changes his cattle, and he follows right up with the good cattle and comes along behind with the poor cattle, and they keep that way the best feed for the good cattle and try to fatten them and get them off. That anything you want to know about stock he can tell you about. That it ain't no boast; that every ranch has to be fenced; that he would have his
3792 fences with a field so it would suit him. That he has given his personal attention to his 500,000 acre ranch in Mexico. That he has paid attention to all of them with the exception of the last three years. That he has run 'em all and took charge of them. That he was in Mexico not long ago; two years or a little less than that. That so far as the topography of the Malibu Ranch is concerned, he has no knowledge as to where the canyons are, or where the barrancas or waters are. That he doesn't know much

3793 about the Malibu Ranch. That all the answers he has given are based on the hypothesis that has been submitted by counsel, so far as the Malibu Ranch are concerned. That he has given here what he has been asked his opinion. That he had given rights of way for two roads through his Corona Ranch.

Redirect Examination.

Q. Did the roads built through this Pioneer
3794 Ranch when you gave them these rights of way damage the ranch?

Mr. Anderson: We object to that as not redirect examination; on the further ground that this witness is not qualified to testify on market value.

The Court: The question relates to the stock ranch feature and not the market value.

Mr. Vallee: Certainly.

The Court: Overruled.

3795 (Exception No. 70.)

That in his experience as a cattle man, cattle are turned loose in order to have them fattened. That they are turned loose; that they follow them up with feed; it is on what is called range cattle, range beef. That this is done on ranches which are fenced.

At the close of the evidence the court announced that the issues relating to damages only would be submitted to the jury, and that the remaining issues would be decided by the court.

3796 Thereafter, on the 6th day of December, 1918, at the request of all parties, and with the consent of the court, the jury was taken upon the Malibu Ranch, accompanied by the court and the court officers, the attorneys for the respective parties, and certain of the witnesses who were familiar with the various matters on the ground that had been testified to; and the jury was taken through the ranch in automobiles, stopping and
3797 getting out at certain points of special interest, the route traversed being the private ranch road now on the ranch and shown on Exhibit A, from Los Flores Canyon to the Ventura county line; and the location upon the ground of the proposed main road right-of-way, as far as was possible, was pointed out to the jury, as was also the location upon the ground of the Alisos Canyon road right-of-way, and the various other matters upon the ground, the locations of
3798 the various cultivated lands, and such other things as were deemed to have any bearing upon the issue of damages, whether for the taking of the properties sought to be condemned, or the damage, if any, to the remaining property by reason of severance, were also pointed out to the jury.

"That thereafter and on the 16th day of December, 1918, the following stipulation was entered into and filed with the clerk of the court:

3799 'Title of Court and Cause.

STIPULATION IN RE HUENEME, MALIBU AND PORT LOS ANGELES RAILROAD COMPANY.

'It is hereby stipulated and agreed by and between the plaintiff herein and the defendant Hueneme, Malibu and Port Los Angeles Railroad Company, a corporation, that said defendant claims no damages for the taking of, or for damage by severance, or otherwise, to any of
3800 its property involved in the above entitled action, and that the jury, in the above entitled action, may find in accordance with this stipulation.

Dated this 16th day of December, 1918.

A. J. HILL,
County Counsel.
Deputy County Counsel.
Deputy County Counsel.
Attorneys for Plaintiff.

3801 ANDERSON & ANDERSON,
NATHAN NEWBY,
Attorneys for Said Defendant.'"

That thereafter, on December 16th and December 17th, 1918, the issues as to damages only, both for the taking of the property sought to be condemned and for the damage, if any, resulting in each case from the severance due to the taking of such properties, were fully argued to the jury by counsel for all of the parties.

3802 That the court, at the conclusion of said arguments, and on the 18th day of December, 1918, gave the following instructions to the jury:

"Gentlemen of the Jury: The instructions which will now be given you constitute the law of this case, and under your oaths you are bound to accept such, in considering the evidence in this case and reaching a verdict herein.

"This action is equally important to the plaintiffs and the defendants, for while the right of
3803 eminent domain, being an incident to sovereignty, is important, it is not more so than the right to own, possess and enjoy private property and to be secure in the ownership, enjoyment and possession thereof. Our form of government and all our laws forbid the state or any individual from taking private property from citizens without just compensation, and you must ever keep in mind throughout your
3804 deliberations the equal importance of this case to the plaintiffs and the defendants.

"The instructions must be taken as a whole and in their entirety, and must be construed and considered together, and in relation to one another, and no single or several instruction, or instructions, should be considered to the exclusion of any and all others given herein.

"Given by the court.

"McCormick.

"You are instructed that you are now trying three several actions brought by the county of

3805 Los Angeles as plaintiff, aaginst the Rindge Company, a corporation, and others as defendants for the purpose of condemning for highway purposes certain parcels of real property owned by the defendants.

"That one of these cases has been known and referred to throughout the trial and proceedings, and will be hereafter referred to in these instructions, as the main road case, and is the
3806 case in which it is sought to condemn for highway purposes a strip of road 40 feet in width, commencing at the easterly line of what has been known and referred to herein as the Malibu Ranch or Rindge Ranch, and running thence in a general westerly direction through the entire length of said ranch to the Ventura county line, and ending at a point where the Ventura county line and the westerly line of the said Malibu or Rindge Ranch coincide and at which
3807 said point the said Malibu or Rindge Ranch terminates; and that in said main road case the plaintiff also seeks to condemn for highway purposes 147 additional parcels of land contiguous to the said 40 ft. strip, and lying on either side thereof;

"That another of said cases has been known and referred to throughout the trial as the Alisos Canyon road case and will be so referred to hereafter in these instructions, and that in and by said last mentioned case the county of Los

Angeles as plaintiff seeks to condemn a certain parcel of land 40 ft. in width, and running from the northerly boundary line of said Malibu or Rindge ranch in a general southerly direction, down to and intersecting with the said main road herein above described at a point a little west of what has been testified to and described as Lachusa Canyon in said ranch; and also two additional parcels of land adjoining and lying on either side of the said last mentioned 40 ft. strip, all for highway purposes.

"That the third and other of said cases has been known and referred to throughout the trial of this case, and will hereafter in these instructions be referred to as the beach road case and that in and by said beach road case the plaintiff seeks to condemn for highway purposes a 40 ft. strip of land beginning at a point slightly north of the proposed 40 ft. right of way for the said main road, and at a point of intersection of said proposed beach road with the said proposed Aliso Canyon road, and running thence in a general southerly direction across said main road and along or adjacent to the easterly bank of that certain canyon referred to and described in the evidence as Little Aliso Canyon upon said Malibu or Rindge Ranch southerly to a point on the bluff immediately above the Pacific ocean, and thence in an easterly direction to a point near the easterly bank of the said Lachusa

Canyon, and thence in a southerly direction down to the beach of the Pacific ocean, and to the high tide line of the said Pacific ocean on said beach and also for highway purposes two additional parcels of land immediately adjoining and lying one on each side of said last described 40 ft. beach road proposed right of way.

"That the answering defendants in the said main road case and the defendants who have or claim an interest in the said real property sought to be condemned by the plaintiff for highway purposes in said main road case and herein above described are the Rindge Company, a corporation, May K. Rindge and the Hueneme, Malibu & Southern Railway, a corporation;

"That the only defendant in the Aliso Canyon road case, and the only person claiming any ownership or interest in the land sought to be condemned by the plaintiff for highway purposes in said case, is the Rindge Co., a corporation;

"That the answering defendants, and the only person having or claiming an interest or ownership in the land sought to be condemned by plaintiff for highway purposes in the said beach road case, are the Rindge Company, a corporation, the Hueneme, Malibu & Port Los Angeles Railway, a corporation, and the Hueneme, Malibu & Southern Railway, a corporation; but as to the two railway corporations there is no

evidence in the beach road case concerning any damages as to them.

"Defendants request. Given.

McCORMICK, J.

"It is the exclusive province of the judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a verdict upon the facts in the case, as determined by you, and the law as given to you by the judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given to you by the court. On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose. The court cannot determine the facts, nor aid you in arriving at them, except by giving you the rules of law to be used by you in arriving at the truth. You are sole judges of the effect and value of the evidence. Your power, however, of judging of the effect and value of the evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfies your minds; in other

words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds, as against a lesser number whose testimony does satisfy your minds.

"In civil cases a preponderance of evidence is all that is required, that is such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

"In weighing the evidence you are to consider the credibility of witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses, their character, as shown by the evidence; their manner on the stand; their relation to the parties, if any; their interest in the case; their bias and prejudice, if any; their degree of intelligence; the reasonableness or unreasonableness of their statements; and the strength or weakness of their recollection may be taken into consideration for the purpose of determining their credibility.

"A witness is presumed to speak the truth, this presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony, or by testimony affecting the character of the witness for truth, honesty or integrity, or his motives, or by con-

tradictory evidence. A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and being convinced that a witness has stated what was untrue, not as the result of mistake or inadvertence, but wilfully and with a design to deceive, you must treat all of his testimony with distrust and suspicion, and reject it all, unless you shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth.

"The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even though a number of witnesses on the other side might testify to an opposite state of facts, if, from the whole case, the jury believes that the greater weight of the evidence considering its reliability and the credibility of the witnesses is on the side of the one witness as against the greater number of witnesses.

"You should not consider as evidence any statement of counsel made during the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts.

"You must not consider for any purpose any evidence offered and rejected, or which has been

stricken out by the court; such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inferences which you may deduce therefrom, and such presumptions as the law may deduce therefrom as stated in these instructions, and upon the law as given you in these instructions.

"You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action. It is the duty of the jurors to deliberate and consult with a view to reaching an agreement, if they can do so, without violence to their individual judgment upon the evidence under the instructions of the court. Each juror must decide the case for himself, but should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to change his views or opinions on the case when convinced that they are erroneous. If some of your number should conscientiously believe, after an entire comparison and consideration of all the testimony in the case, and of the instructions of the court, that the verdict should be for a particular party to the action, then such jurors should so vote; and if some of your number should likewise conscientiously believe, after such consideration, that the verdict should be for the other party to the action, then such jurors should so vote; but

3826 no juror should vote for either party nor be influenced in so voting, for the single reason that a majority of the jury should be in favor of such party. In other words, despite your duty to agree if such be possible, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict for or against either party solely because of the opinion of the other jurors.

3827 Given.

McCormick, J.

"An action brought for the purpose of acquiring private property for a public use by condemnation thereof is brought under what is known in law as the right of eminent domain, which may be defined as the right of the people or government to take private property for public use. This right includes the right to take private property for public highway purposes in

3828 the manner proposed in this proceeding. The Constitution of this state provides that private property shall not be taken or damaged for public use without just compensation being made or paid into court or the owner, and it is for the purpose of assessing and determining the just and fair compensation to which the defendants are entitled that you are called upon as jurors in this case.

Plaintiffs request. Given as modified.

McCormick, J.

"Therefore, the only issues which you are called upon to determine in either of the three cases about to be submitted to you are the issues heretofore referred to in these instructions, and that which relate wholly and solely to the questions of the monetary compensation to the defendants for such damages as will accrue to them by reason of the taking of the respective properties sought to be condemned, and by reason of the severance of such properties from the remaining property owned by the defendants, and by reason of the cost of constructing the necessary fences which will have to be constructed in connection with the construction of the said proposed road; and in determining these issues you must not consider any part or portion of the evidence that does not bear directly upon them, and particularly you must not consider any part or portion of the evidence with reference to any former user of any roads upon or across the Malibu Ranch by any persons; nor the present or past situation of any of the persons living adjacent to the ranch either to the north or in Ventura county in the so-called Yerba Buena district, or any need or needs of any person or persons whatsoever for a road or roads through any of the property of either of the defendants; all of such evidence having been received in these cases upon questions and issues other than those which you are called upon to determine,

and upon questions and issues with which you, in your determination of the questions and issues to be submitted to you, have nothing whatever to do.

Given. Defendants request.

McCORMICK, J.

"It is your duty to ascertain and assess:

"*First*—The actual market value of the 40 foot strip of the land of each defendant sought to be condemned.

"*Second*—The actual market value of the additional parcels of land of each defendant sought to be condemned.

"*Third*—If any land sought to be condemned is a part of a larger parcel of land owned by the same owner, whether or not that portion of such larger parcel not sought to be taken will be damaged by reason of the severance therefrom of the part sought to be taken, and the construction of the proposed road in the manner proposed by plaintiff and shown by the evidence.

"*Fourth*—The amount of such damage by severance, if any.

"*Fifth*—The value of all improvements pertaining to the realty upon each parcel sought to be condemned.

"These matters you will find separately as to each of the defendants, in each of the three cases on trial.

3835 "You will also find:

"(a)—The number of miles of fencing which it will be necessary to construct on the property of the defendants May K. Rindge and the Rindge Company by reason of the taking and use for highway purposes of the land sought to be condemned in these actions.

"(b)—The kind or kinds of fences which will be suitable.

3836 "(c)—The cost per mile of such fencing.

"These matters, as to fencing, you will find separately as to the defendant May K. Rindge, and the defendant Rindge Company, respectively, in the case involving the main road, and as to the Rindge Company alone, in the cases involving the Los Alisos road and the beach road, respectively.

Given as modified. Plaintiffs request.

McCormick, J.

3837 "In determining the amount of compensation which should be awarded for property taken or damaged, you should not adopt the plan of taking the aggregate of the sums testified to by the various witnesses as to value and dividing such aggregate sums by the number of such witnesses and awarding, by your verdict, the average thus obtained. This method of arriving at a verdict is improper and illegal.

Given. Plaintiff's request.

McCormick, J.

3838 "In estimating and assessing the awards to be made, in the case involving the condemnation of the easement, for the so-called main road through the ranch, the same should be fixed as of the date of this trial, to-wit, September 30, 1918, and the actual market value of the property at that time should be the measure of compensation to be awarded for all property to be actually taken, and the basis of estimating and fixing damages, if any, to property not actually
3839 taken.

"In the case involving the condemnation of the easement for the proposed Los Alisos road, the 24th day of January, 1918, and in the case involving the condemnation of the easement for the proposed beach road, the 9th day of August, 1918, must be taken as the dates upon which the values of the parcels to be actually taken and the damages, if any, to property not actually
3840 taken, are to be determined."

Given as modified. Plaintiff's request.

McCORMICK, J.

"The burden of proof rests upon the various defendants to establish:

"(a) the actual market value of the land sought to be condemned;

"(b) the actual market value of the improvements, if any, which will be taken or damaged;

"(c) whether or not their remaining property not sought to be taken, will be damaged by rea-

son of the severance therefrom of the land sought to be taken;

"(d)—the amount of such severance damages, if any.

Given at plaintiff's request.

McCormick, J."

"The measure of damages which you are to apply in this case, in so far as the land taken is concerned, is the actual value of such land taken; that is to say, its market value which is the highest price estimated in terms of money which the land would bring if exposed for sale in the open market with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which said land was adapted and for which it was capable.

"You are not to consider what the land was worth to the defendant, or defendants, the owners, for speculation or merely possible uses, nor what said defendant, or defendants have claimed it was worth to her, or them, nor what it may be worth to the plaintiff in this action for road or other purposes, nor what the land would bring at a forced sale.

"You are not to consider the price the land would sell for under special or extraordinary circumstances, but its fair market value if offered in the market under ordinary circumstances for

3844 cash, a reasonable time being given to make the sale.

"The location of the property, its surroundings, and all other things are to be considered, but you are not to indulge in speculation or conjecture. You must take into consideration the purposes for which the property was adapted and determine the market value from what a person would, at the dates mentioned in the other instructions given herein, have paid for
3845 the property in cash, not buying, however, as I have said, for any particular purpose, but having regard to the market value of the property as it then stood, for all purposes.

Given by the court.

McCormick, J.

"After you have determined the value of the 40 ft. strip and the parcels of land sought to be condemned herein, you must then ascertain and
3846 assess the amount of damages, if any, which accrue to the portion not sought to be condemned by the plaintiff, but which you find will be damaged by reason of severance, as I shall hereinafter define such severance. This damage, if any, will be determined by ascertaining in the same manner as heretofore stated, the market value of those portions of said tract or tracts, not taken, as it was on the respective dates herein mentioned, and by deducting therefrom the market value of said property after the sev-

erance and after the proposed road is constructed. The difference between these values, if there shall be any, will be the amount of damage done by the opening of said road to the part of said land, or lands, not taken.

"The law fixes this method of ascertaining damages in this case and it is your duty to follow it strictly and literally. You must exclude in this estimate, however, any estimate of benefits, if any, derived from building the road to the property not taken.

Given by the court.

McCormick, J.

"Wherever in any of the instructions given to you in either or any of the three cases, on the question of severance, such severance means in the case of each defendant, the taking or dissevering of the property sought to be condemned from the remaining part or portion of the property belonging to such defendant, and the damages, if any, to be awarded for such severance, are those which will accrue to such defendant, if any, by reason of the taking of the property sought to be condemned from the remaining portion of said property and the construction of said proposed road in the manner proposed by the plaintiff.

Given at defendants' request.

McCormick, J.

"If you should find from the evidence that any damages will accrue to the portion of the

land of any defendant, not sought to be condemned, by reason of its severance from the portion of any such defendant's land sought to be condemned, and the construction in such instance of the said proposed road in the manner proposed by the plaintiff, then you are further instructed that such and every such defendant is entitled, as a matter of right, to the full amount of such damage as you may find will so result, and that your duty, if you find that such damage will so result, is to ascertain and fix the amount thereof in each instance.

Given. Defendants' request.

McCormick, J.

"You are instructed that the evidence shows that May K. Rindge, one of the defendants in the so-called main road case, is and at all the times mentioned in the complaint in said main road case, was the owner and entitled to the possession of a portion of the real property known as the Malibu Ranch or Rindge Ranch, through which the proposed road known and designated and referred to throughout the said case as the main road runs, and that the said portion of said property of said defendant May K. Rindge lies between the eastern boundary of said Malibu or Rindge Ranch and the boundary line between the property of said May K. Rindge in said ranch and the property of the Rindge Company in said ranch, just west of Marie Canyon, as

3853 shown upon 'Exhibit A' attached to the complaint in said case, and between the mean high tide of the Pacific ocean on the south, and the northern boundary line of said Malibu or Rindge ranch on the north, and contains about 1947 acres.

Given. Defendants' request.

McCormick, J.

"That the plaintiff seeks in the action known as the main road case to condemn that portion
3854 of said property of the said defendant, May K. Rindge, described in the complaint in said action and shown upon the map, 'Exhibit A,' annexed to the complaint in said action, and placed in evidence herein, as a forty foot strip right of way for highway purposes over and across said land of the defendant May K. Rindge, commencing at Las Flores Canyon at the easterly boundary of said land and the said Malibu
3855 ranch, and running thence in a general westerly direction through the said land of the said May K. Rindge to the westerly boundary of the said land of the said defendant, May K. Rindge, slightly west of Marie Canyon, as shown on said map 'Exhibit A,' which said forty foot strip right of way so sought to be condemned contains about 22.14 acres of land; and that the plaintiff further seeks in said action, the said main road case, to condemn of the said land of the said defendant, May K. Rindge, for high-

3856 way purposes, certain additional parcels of land described in the complaint therein, and shown upon said map, 'Exhibit A,' and numbered respectively parcels 1 to 20A, both inclusive, and consisting of 21 separate parcels of land lying immediately adjoining and on both sides of said forty foot strip of land last described, and containing in the aggregate about 4.86 acres of land.

Given, defendants' request.

McCORMICK, J.

3857 "You are instructed that the evidence shows that the Rindge Company, one of the defendants in each of the above entitled and described actions, is and at all the times mentioned in the complaint in the 'main road' case, was the owner of and entitled to the possession of a portion of the real property known as 'Malibu' or 'Rindge' ranch, through which the proposed road known and designated and referred to in the

3858 complaint in said action, and referred to throughout the said case as the 'main road' runs, and that its said portion of said property lies west of the western boundary line of the property of May K. Rindge in said ranch and between said western boundary of said property of May K. Rindge, and the boundary line between Los Angeles and Ventura counties on the west, and between the mean high tide line of the Pacific ocean on the south and the northern bound-

3859 ary of said Malibu or Rindge ranch on the north, and contains about 11,332 acres.

Defendants' request. Given.

McCormick, J.

"The plaintiff seeks in the action known as the 'main road case,' to condemn that portion of said property of said defendant Rindge Company, described in the complaint in said case and shown upon the map, 'Exhibit A,' annexed to the
3860 complaint in said case and placed in evidence herein, as a forty foot strip right of way for highway purposes, over and across said land of the defendant Rindge Company, commencing at the westerly boundary line of the land of May K. Rindge, which is and constitutes the eastern boundary line of the said land of the Rindge Company, and running thence in a general westerly direction on said land of said Rindge Company to the westerly boundary line of said land
3861 of said defendant Rindge Company, which is the said boundary between the said counties of Los Angeles and Ventura; that said forty foot strip right of way sought to be condemned contains 80.55 acres of land; and that the plaintiff further seeks in the said main road case to condemn of the said land of said Rindge Company, for highway purposes, certain additional parcels of land described in the complaint in said main road case and shown on said map, 'Exhibit A,' and numbered respectively parcels 21 to 176,

both inclusive, and consisting of 156 separate parcels of land, lying immediately adjoining said forty foot strip of land last described, and containing in the aggregate 39.57 acres of land.

Given, defendants' request.

McCormick, J.

"You are instructed that in the main road case the only evidence as to the kind and character of road to be constructed which you are to consider is that furnished by the estimates, profiles and cross sections introduced in evidence here, the same showing a general right of way of 40 feet in width, together with various and sundry off-sets on either side thereof, for the necessary fills and cuts, and other purposes necessary to the construction of said road, and the construction within said right of way of a road to grade 22 feet in width and the entire length of said road to grade 22 feet in width and the entire length of said road to be 21.18 miles, and said road to be intersected with bridges and culverts of the type and character testified to herein, to be placed at the respective points testified to herein, and that under the testimony these bridges and culverts are the only means of passing across said road to the north or the south which are shown by the evidence and which can be considered by you.

Defendants' request.

Given.

McCormick, J.

"In considering and determining in any instance or instances whether or not the portion of the land of any defendant or defendants not sought to be condemned will be damaged by reason of the severance therefrom of the portion of the land of such defendant or defendants sought to be condemned, and the construction in any such instance or instances of said road in the manner proposed by the plaintiff, you are entitled to, in such instance, take into consideration and to consider the nature and character of the proposed improvement, the manner in which it is located upon the land of the particular defendant, the extent, location and character of the lands of such defendant proposed to be taken by the plaintiff for the proposed road or improvement, the uses to which the said land of such defendant have been and are being put, and to which it is best adapted, and all of the facts and circumstances developed by the evidence which in any way bears upon the question of whether or not any such damage to such defendant by reason of such severance would accrue.

Defendants' request.

Given.

McCormick, J.

"You are further instructed that in considering and determining the question as to whether or not any damage would result by reason of

3868 the severance of the portion of the property of any defendant not sought to be condemned, and by reason of the construction in such instance of the improvement in the manner proposed by the plaintiff, you must not enter into any speculative consideration of any prospective, future uses to which such land of such defendant may or might be put, but you are to confine your consideration solely in this regard to the uses to which it has been and is being put, and to which
3869 at the respective times hereinbefore stated it was best adapted.

Defendants' request.

Given.

McCormick, J.

"In considering the question of severance damage, you may consider the increased cost of cultivating the arable lands of such defendant, if any, which would result from said severance,
3870 and the construction of said proposed road, and also the increased cost, if any, of handling the stock upon any of such property, due to the said severance and construction of said proposed road, and also the detriment and damage, if any, to any of said property as a stock ranch, due to the said severance, and to said construction of said proposed road; and, further, in this connection, you may consider the detrimental effect, if any, upon any stock ranging and feeding upon said land, due to the said severance and to

3871 the construction of said proposed road, and also the interference, if any, with the access to water, and pasture, due to said severance and construction of said proposed road in the manner proposed by the plaintiff.

Given as modified.

Defendants' request.

McCormick, J.

"Should you find from the evidence that any
3872 part of the proposed road, if any, will divide pasture land and render it more difficult to get live-stock to and from the customary stock watering places, or to or from different parts of the stock range, and thereby add to the cost of handling live-stock upon the remaining property, then any such added cost, if any, would constitute damages, by way of severance to the remaining property of any such defendant, which it would be your duty to consider in
3873 arriving at your verdicts upon the issues of severance damages.

Defendants' request.

Given as modified.

McCormick, J.

"In considering the question of severance damages, you may consider the damage, if any, done to any private road of such defendant, now upon said ranch, which lies within the right of way and proposed parcels sought to be condemned by the plaintiff; and if you should find

3874 that said severance and said construction of said proposed road in the manner aforesaid does cause a damage to any such defendant by reason of any destruction of said private road or interference with its use, then such damage must be ascertained by you and included in the amount of damages, if any, as you find will result to such defendant or defendants by reason of said severance and said construction of said proposed road.

3875 Defendants' request. Given as modified.

McCormick, J.

"You are further instructed that in determining as to whether or not any damages would result to either of the defendants in either of the cases by reason of the severance as defined in these instructions, and in awarding the damages to such defendant or defendants, if any you may find, are so damaged, you must not be

3876 swayed by any matter of passion or prejudice, but must act with absolute fairness between the parties, and you must award such damages only, if any are awarded, as are fair and reasonable, and as will fairly compensate such defendant or defendants, if any, to whom the same are awarded.

Defendants' request.

Given.

McCormick, J.

"As a general rule, witnesses are permitted to testify merely as to facts, and are not permitted to give their opinions or conclusions. An exception to this rule, however, exists when the subject of inquiry is one which relates to a trade, profession, science or art, in which persons instructed therein by study or experience are presumed generally to have more skill and knowledge than the ordinary person of average intelligence. In such cases witnesses who have been shown to be qualified as experts along the particular line of inquiry, are allowed to give their opinions as an aid to the jury in determining the facts. The jury, however, is not bound by the opinion of any expert witnesses, but must determine the fact for themselves, and it is your province to weigh the testimony of witnesses whose opinions have been given upon the subject of values and damages, by reference to the whole situation of the property and its surroundings and all the surrounding circumstances, and by applying to it your own experience and knowledge. This does not mean that you can act in any case upon particular facts material to its disposition resting in your private knowledge, nor that you are to constitute yourselves witnesses in the case, but you may and should judge of the weight and force of the evidence by your own knowledge of the subject of the in-

3880 quiry. You are not bound to give weight to any testimony which is contrary to what persons of average intelligence know to be true.

"An opinion is entitled to only the weight given to it by the reasons by which it is supported and you are the sole judges of the strength or weakness of the reasons advanced.

Given.

McCormick, J.

3881 "You are instructed that the evidence shows that the Hueneme, Malibu & Southern Railway, a corporation, one of the defendants in the said main case, is the owner of a certain 60 foot right of way for railroad purposes, commencing at the easterly line of said Malibu Ranch and extending thence through said ranch in a westerly direction to the county line between the counties of Los Angeles and Ventura.

Defendants' request.

3882 Given.

McCormick, J.

"That the plaintiff seeks in the action known as the main road case to condemn certain small parcels of the said railroad right of way of the said defendant Hueneme, Malibu & Southern Railway Corporation, both in connection with the proposed forty foot right of way and said proposed road or highway, and as parts of the

3883 parcels lying on either side of said proposed right of way for said highway.

Defendants' request.

Given.

McCORMICK, J.

"That the issues and the only issues which you, the jury, are called upon to determine in the main road case as between the plaintiff and the defendant corporation, Hueneme, Malibu &
3884 Southern Railway, are the following:

"I—The reasonable market value of the portions of the said right of way of said Hueneme, Malibu & Southern Railway sought to be condemned as a part of the said 40 foot right of way which the plaintiff seeks to condemn in said main road case through the entire Malibu Ranch.

"II. The reasonable market value of the additional portions of said right of way of said railway corporation defendant which the plain-
3885 tiff seeks to condemn in connection with the parcels sought to be condemned by the plaintiff on either side of said 40 foot right of way through said ranch for highway purposes.

Defendants' request.

Given.

McCORMICK, J.

"The law of this state provides that every railroad corporation must, within two years after filing its original articles of incorporation, begin the construction of its road, and must

3886 every year thereafter complete and put in full operation at least five miles of its road until the same is fully completed, and upon its failure so to do, for the period of one year, its right to extend its road beyond the point then completed is forfeited. After the completion of any railroad or any part thereof capable of being operated, its owner must operate it and upon his failure to keep it, or any portion thereof, in full operation for the period of six months, his right
3887 to operate it in whole or in part, as the case may be, is forfeited, and the lands occupied for the purposes of the road so far as the same is not operated, revert to the original owners or their successors in interest.

"The law further provides a definition of the term 'Full operation,' viz.: 'A railroad is in full operation when one passenger train or one mixed train is run over it once a day in each
3888 direction, and a sufficient number of freight trains to accommodate the traffic on the road.'

"I further instruct you that if you find that either one of the defendant railroad corporations has failed to begin the construction of its road within two years after filing its original articles of incorporation, and thereafter to complete each year and put in full operation, as I have defined that term to you, at least five miles of its road, and if this failure has existed for a period of one year, the right of such railroad company to

3889 extend its road beyond the point then completed is forfeited.

Plaintiff's request.

Given.

McCormick, J.

"In reference to the matter of fencing, in answering the special interrogatories submitted to you concerning said matter, you will bear in mind the concession of the plaintiff in this case
3890 as stated by its counsel in open court as follows: 'We concede that it will be necessary to fence, I won't say every foot, because there might be places where the road goes so near the shore that a fence on one side would keep the cattle out, but along a good portion of the road it will be necessary to fence probably both sides of the road, and at others, one side, if necessary, lying parallel with the road for the purpose of keeping the cattle out of the field and out of the
3891 road.'

Given by the court.

McCormick, J.

"The only question, therefore, in so far as the necessity for the construction of fences is concerned, which is left open for your determination, is whether or not the fencing will be necessary for the entire roadway, and, if not, then for what portions, and how many miles of

3892 said roadway, and the kind of fence best suited to properly and reasonably fence the land.

Defendants' request.

Given as modified.

McCormick, J.

"You are further instructed that in consid-
ing the question as to the extent to which it is necessary to fence the ranch and whether a fence in whole or in part along the said proposed
3893 roads is necessary, and whether, if in part only, what parts it is necessary to fence, you must take into consideration the nature and character of the use to which the property is being put, and the nature and character of the property itself, and the nature and character of the rights of way of the said proposed roads.

Defendants' request.

Given.

McCormick, J.

3894 "A special form of verdict in each of the three cases has been prepared and will be handed to you. You are instructed that when nine of your number have agreed upon the verdict in any case, you will cause it to be signed by your foreman and returned into court. It is not necessary that the same nine shall agree in the case of all the parcels of land sought to be condemned. It is sufficient if any nine agree as to the award that should be made for the taking of a particular parcel; a different nine may agree as to the

award that should be made for the taking of some other parcel. It is, however, necessary that the same nine should agree in arriving at the amount of damages, if any, to the land of any defendant not sought to be taken, as have agreed as to the award to be made to such defendant for the land taken. The same nine must agree in fixing severance damages if you find any that have agreed in fixing damages on the parcels of land.

Plaintiff's request.

Given.

McCormick, J.

"Nothing that I have said in any instruction which I have given you is to be regarded by you as in any way indicating any belief or opinion on the part of the court as to the existence or non-existence of any fact or circumstance in this case except wherein the court states stipulations and concessions of facts. It is the province of the court to instruct you as to the law, but you are the sole judge of the facts.

Given as modified.

McCormick, J.

"There are three forms of verdict and I shall read them to you as follows:

"Verdicts read.)

"In interrogatory No. 12 on page three of the special issues submitted in the so-called main road case, you are to consider in answering said

3898 interrogatory the concession which I have heretofore stated in the instructions given.

"Gentlemen of the jury, wherever you find the spaces which are to be filled in by pen and ink by one of your number whom you will select as foreman, in some instances you will find that some of the spaces,—for instance the one pertaining to the kind of fence which may be best suited for the purpose, you will find that the space in the answer may not be sufficiently long.
3899 Do not hesitate to state the answers in full and explicitly and with definiteness and certainty so that we may know just what you find on the interrogatories."

To the giving of each and all and every of said instructions and to the whole thereof, save and except those only which are noted as having been given at the request of the defendants, the defendants and each of them in each of these
3900 cases, to-wit: the main road case and the Alisos Canyon case, then and there duly excepted.

Exception No. 71.

That the following instructions requested by the defendants were refused by the court and not given:

VII.

That the issues and only issues which you, the jury, are called upon to determine as between the plaintiff and defendant, May K. Rindge, are

3901 the following issues in the main road case, to-wit:

1—The reasonable market value of the forty foot strip of land of said defendant, May K. Rindge, sought to be condemned by the plaintiff in said main road case, and all improvements thereon pertaining to the realty.

2—The reasonable market value of the additional parcels of land of the defendant, May K.
3902 Rindge, sought to be condemned by the plaintiff in said main road case, and all improvements thereon pertaining to the realty.

3—Whether or not any damage will accrue to the remainder of the property of the defendant, May K. Rindge, in said Malibu Ranch, which is not sought to be condemned by reason of the severing of said remaining property from the portions of said ranch belonging to said May K. Rindge sought to be condemned, to-wit: the said
3903 forty foot strip and said parcels of land belonging to said May K. Rindge, and in these instructions more specifically described and referred to, and by reason of the construction of the contemplated improvements, that is to say, the said proposed road in the manner proposed by the plaintiff; and in the event that you should find from the evidence that the portion of the said ranch belonging to said May K. Rindge not sought to be condemned in said main road case, will be damaged by reason of its severance from

3904 the portion sought to be condemned, then it will be your duty to find and assess, separately, the total amount of such damage caused by such severance.

4—How many miles of fence will be necessary in connection with the construction by the plaintiff of said proposed road, through the lands of the defendant, May K. Rindge, in the manner proposed by the plaintiff.

3905 5—The reasonable cost of constructing such fencing, together with the offsets.

Refused. In inst. of plaintiffs—requested.

McCormick, J.

X.

You are instructed that the Rindge Company is the sole defendant in the so-called "Alisos Canyon Road Case," and that it is and at all the times mentioned in the complaint in said Alisos Canyon road case, was the owner of and entitled

3906 to the possession of that certain real property known as the Malibu or Rindge Ranch, through a portion of which the proposed road known and designated and referred to throughout the said case known as the Alisos Canyon road runs, and that the real property of said Rindge Company is the portion of the Malibu or Rindge Ranch already described to you in these instructions.

"Deft.'s request—refused. See inst. I of defts. Requested.

McCormick, J."

3907

XI.

That the plaintiff seeks in the action known as the Los Alisos Canyon road case to condemn for highway purposes a portion of the said property of said defendant Rindge Company described in the complaint in said action, and in these instructions described as the part of said Malibu or Rindge Ranch belonging to the defendant Rindge Company, which said property
3908 sought to be condemned for highway purposes in said Los Alisos Canyon road case consists of a forty foot strip of land commencing at the northern boundary line of said Rindge or Malibu Ranch, and extending southerly down to said Alisos Canyon to a point near the northerly boundary line of said main road just before it reaches the said Alisos Canyon, and then in a southeasterly direction to a point of intersection with said main road just west of La Chusa Can-
3909 yon, as shown upon the map, "Exhibit A," on file in these actions; and also two certain parcels of land lying on either side of the forty foot right of way, which said forty foot strip and said parcels are fully described in the complaint in said Alisos road case, and are shown by the map annexed to the complaint in said Alisos road case as "Exhibit A," which said map has offered and received in evidence in said Alisos road case.

3910 "Deft.'s request—refused. Covered by instructions given—repetition.

McCORMICK, J."

XII.

You are instructed that the evidence shows that the Rindge Company, one of the defendants in the so-called "Beach Road Case," is and at all the times mentioned in said beach road case was the owner of and entitled to the possession of a portion of the real property known as the Mal-
3911 ibu or Rindge Ranch, through a portion of which the proposed road known and designated and referred to throughout the trial as the "Beach Road" runs, and that the said property of the Rindge Company in said Malibu or Rindge Ranch is the said property of the Rindge Company already described in reference to its property in the main road case.

"Deft.'s request—refused. Repetition. See I.

3912 McCORMICK, J."

XIV.

That the issues and the only issues which you, the jury, are called upon to determine in each of the three cases, as between the plaintiff and the said defendant, Rindge Company, are the following:

1—The reasonable market value of the 40 foot strip of land sought to be condemned in each case and all improvements thereon pertaining to the realty.

3913 2—The reasonable market value of the additional parcels of said defendant's lands sought to be condemned in each case, by the plaintiff, and all improvements thereon pertaining to the realty.

3—Whether or not in each case any damages will accrue to the remainder of the property of the Rindge Company in said Malibu Ranch which is sought to be condemned, by reason of
3914 the severance of said remaining property from the portions of said ranch sought to be condemned, to-wit: the said 40 foot strip in each case, and the said parcels of land in each case, and by reason of the construction in each case of the improvement, that is to say, the said proposed road in the manner proposed by the plaintiff, respectively, in each case; and in the event that you should find that said portion of said ranch belonging to the defendant, Rindge Com-
3915 pany, not sought to be condemned in each or either or any of the cases, will be damaged by reason of its severance from the portion sought to be condemned, and by the construction of said improvement in the manner proposed by the plaintiff, then it will be your duty to find and assess, separately, the total amount of damages caused by such severance in such case or cases, if any, as you may so find.

4—How many miles of fencing in each case will be necessary in connection with the con-

3916 struction by the plaintiff of the proposed road in each case, in the manner proposed by the plaintiff.

5—The reasonable cost in each case of constructing such necessary fencing, together with the offsets.

Deft.'s request—refused. Repetition.

McCormick, J.

XVII.

3917 You are instructed that the evidence shows that the Hueneme, Malibu and Southern Railroad Company, one of the defendants in the beach road case, is the owner of and is entitled to a sixty foot right of way for railroad purposes, commencing at the eastern boundary line of the Malibu or Rindge Ranch, and running thence westerly through said Malibu or Rindge Ranch to the county line between Ventura and Los Angeles counties, and that the said right of
3918 way is intersected and crossed by the said proposed beach road.

Defendant's offer—refused.

McCormick, J.

XIX.

You are instructed that the evidence shows that in the beach road case the defendant, Hueneme, Malibu and Port Los Angeles Railway Company, a corporation, is the owner of and entitled to the possession of a certain railroad right of way 200 feet in width and extending

3919 along the line of the mean high tide from the eastern boundary of said Malibu or Rindge Ranch westerly through said ranch to the said boundary line between the counties of Los Angeles and Ventura, and that said 200 foot right of way of said last mentioned defendant corporation is intersected by the said beach road.

"Deft.'s request—refused. See deft.'s request for general instructions.

3920 McCORMICK, J."

XX.

You are instructed that each of the defendants is, as a matter of right, entitled to the reasonable market value of all of the property belonging to such defendant which is sought to be condemned by the plaintiff in this action, and that the only question in that regard for you to determine in each instance is what that reasonable market value is.

3921 "Deft.'s request—refused. Repetition.

McCORMICK, J."

XXIII.

You are further instructed that if you should find from the evidence that any damages will accrue to the portion of the land of either or any of the defendants not sought to be condemned, by reason of its severance in any instance or instances, from the portions sought to be condemned and the construction of the said proposed road, in any instance or instances, in

3922 the manner proposed by the plaintiff, then you are further instructed that such defendant is or such defendants are, entitled, as a matter of right, to the full amount of such damage as you may find in any instance or instances, will so result, and that your duty, if you find that such damage will so result, is to ascertain and fix the amount thereof as to such defendant or defendants, respectively.

"Deft.'s request—refused. Repetition.

3923 McCormick, J."

XXVII.

You are instructed that in considering and determining whether any damage by reason of the severance, as defined in these instructions, will result to the remaining property of either or any of the defendants, you may consider in each instance the amount and location of the land to be taken, the inconvenience, if any, to

3924 the owner in cultivating the remaining land, or in using it for stock-raising purposes, or for any of the purposes for which it is being used, and to which it is adapted, and the inconvenience, if any, to the owner of getting to and from different parts of his remaining property and in getting his stock and farming implements and other things necessary to the use, management and operation of his remaining.

Refused—repetition and also containing improper elements.

McCormick, J.

3925 XXVII.

You are instructed that in considering and determining whether any damage by reason of the severance, as defined in these instructions, will result to the remaining property of either or any of the defendants, you may consider in each instance the amount and location of the land to be taken, the inconvenience, if any, to the owner in cultivating the remaining land, or
3926 in using it for stock-raising purposes, or for any of the purposes for which it is being used, and to which it is adapted, and the inconvenience, if any, to the owner or getting to and from different parts of his remaining property and in getting his stock and farming implements and other things necessary to the use, management and operation of his remaining property, to and from its different parts.

"Refused—repetition and also containing im-
3927 proper elements.

McCORMICK, J."

XXIX.

Wherever any part of either of the proposed roads crosses a parcel of cultivated land, you may consider as an element of damage the inconvenience, if any, to the owner in farming the remaining portions which will be caused by its being thus divided, and the damages, if any, thus resulting, or damages due to severance.

"Deft.'s request. Refused—repetition.

McCORMICK, J."

3928 XXX.

If the effect of the construction of a public road through private property is to make it more inconvenient and expensive for the owner to cultivate and manage and operate the remaining land, that is a proper element for the consideration of the jury in determining whether or not damage by reason of the severance would result, and in ascertaining and fixing the amount of
3929 such damages.

"Deft.'s request refused—repetition and containing improper elements.

McCormick, J."

XXXIII.

You are further instructed that in weighing the evidence and in determining the issues which will be submitted to you for your determination, you may exercise your own individual judgments as to any of such matters, if any, which have
3930 come within your general knowledge acquired by you through observation and experience.

(Note—See authorities cited in department opinion of Mr. Justice McFarland in *Beveridge v. Lewis*, 137 Cal. 628.)

Defendant's offer—refused.

McCormick, J.

XXXIV.

You are instructed that in considering and determining the issues which will be submitted to you for your consideration and determination,

3931 you must not be swayed in any way by passion or prejudice, but that it is your duty to award to the defendants in each given instance a fair compensation for the property sought to be taken by the plaintiff from such defendant, as the case may be, both for the forty foot strip right of way in each case and for the separate parcels of such defendant, sought to be condemned in each case, and that such fair amount
3932 of damages is the reasonable market value of the property sought to be taken; and in this connection you are instructed that the reasonable market value of the property sought to be taken in the main case is its present reasonable market value, to-wit: at the time of the trial; that the reasonable market value of the property sought to be taken in the action known as the Alisos Canyon road case, is its reasonable market value at the date of the commencement of that action,
3933 to-wit: on January , 1918; and that the reasonable market value of the property sought to be taken for road purposes in the "Beach Road Case" is its reasonable market value as of the date of the commencement of that action, to-wit: on the 9th day of August, 1918.

Refused—repetition.

McCORMICK, J.

To the refusal of the court to give such requested instructions, and to its failure to give the same, and to each refusal of the court to

3934 give each of the same, and to each failure to give each of the same, the defendants in each of said cases then and there duly excepted.

Exception No. 72.

A special verdict in each of these cases (in the form thereafter rendered and hereinafter set forth) was agreed upon by all parties; and both of these cases were thereupon, to-wit: on December 18, 1918, submitted to the jury for its verdicts as in said special forms of verdict indi-
3935 cated.

That by stipulation of the parties and as an aid to the jury in arriving at their verdicts, the following calculations and summaries purporting to show respectively what the counsel who prepared them claimed respectively to be the result of the evidence on the subjects to which they relate, but not as being any evidence in or of themselves of any of the matters to which they
3936 pertain were submitted to the jury; and the jury was fully instructed as to the purpose for which they were prepared and submitted to it, and cautioned to limit their consideration of them to that purpose alone. And that none of the parties hereto made any objection to said submission, but on the contrary requested and consented thereto.

3937 PREPARED BY MR. ANDERSON, ONE OF THE ATTORNEYS FOR THE DEFENDANTS.

DAMAGE SUMMARY

A.

May K. Rindge Portion

I.

Right of Way Strip

	Camfield		$ 3,112.76
	Culver		3,862.78
	Gardner		2,267.37
3938	Butterworth:	$2,254.82	
	Improvements	153.00	2,407.82
	Allen:	2,417.00	
	Improvements	153.00	2,570.00
	Crippen:	2,417.37	
	Improvements:	261.00	2,678.37

II.

Parcels

	Camfield	387.24
3939	Culver	97.24
		207.81
	Gardner	228.57
	Butterworth	228.57
	Crippen	228.57

B.

Rindge Company Portion

I.

Right of Way Strip

Camfield	$ 5,807.60
Culver	5,807.60

3940	Gardner		6,438.91
	Butterworth	$6,438.91	
	Improvements	1,234.50	7,673.41
	Allen	6,456.19	
	Improvements	633.25	7,089.44
	Note—Seems to have omitted iron pipe.)		
	Crippen	6,438.91	
3941	Improvements	1,393.00	7,831.91

II.

Parcels

Camfield and Culver.....	794.40
Gardner, Butterworth, Allen, Crippen	1,278.77

C.

Alisos Canyon

I.

3942 Right of Way

Camfield .....$	184.00
Culver	184.00
Gardner, *et al*.....	121.48

II.

Parcels

Camfield and Culver.....	220.00
Gardner	151.22
Butterworth *et al*.....	151.22

3943

C.

Alisos Canyon

I.

Right of Way

Camfield		$ 184.00
Culver		184.00
Gardner *et al*		121.48

II.

Parcels

3944

Camfield and Culver		220.00
Gardner		151.22
Buterworth *et al*		151.22

D.

Land taken of Malibu, Hueneme and Southern Ry. Co.

I.

In Right of Way

Culver and Camfield		59.06
Gardner		131.23
Butterworth:	$138.92	
Improvement	15.00	153.92
Allen:	131.23	
Improvement	15.00	146.23

3945

II.

In Parcels

Gardner, Allen, Crippen	7.69

3946 FENCING

I.

May K. Rindge Portion

A.

Cost of Offsets or Angles

Note—This is compiled from actual count on the map of the number of different sized offsets, and the figures as to cost of each side given by Otis, Vol. III, pp. 241, *et seq.*

	10 of five feet	at	$ 9.91	$ 99.91
3947	14 of 10	"	" 10.16	142.14
	10 of 15	"	" 11.12	111.20
	7 of 20	"	" 12.37	86.59
	3 of 25	"	" 14.14	42.42
	5 of 30	"	" 14.50	72.50
	1 of 40	"	" 16.28	16.28
	1 of 45	"	" 18.56	18.56
	Total			$589.60

B.

3948 Hog Tight (Vol. III, 135)

Road, 4.57 miles

Both sides, 9.17 miles

9.17 miles (straightaway) at $867.58	$ 7,955.70
Offsets as above	589.60

C.

Five Barbed (Vol. III, p. 196)

9.17 miles at $1,071.65	9,827.20
Offsets	589.60
Total	$10,416.80

3949

D.

Four Barbed (Vol. IV, p. 440)

9.17 miles at $960.38 ..... $ 8,706.68
— " 589.90

II.

Rindge Company

Main Road
Length .....16.61 miles
Total, both sides 33.22 "
3950 Straightaway... 3.10 " doubled, 6.20 miles
Rough ground..11. " " 22. "
Very rough .....2.5 " " 5. "
(Vol. III, pp. 184, 185, 188)

A.

Hog Tight

Straight going,	6.20 miles	at	$867.58	$ 5,378.96
Rough,	22 "	"	1056.07	23,232.44
Very rough	5 "	"	1352.85	6,764.25

3951 Total..... 35,375.65

Offsets 4,509.09

Total $39,885.74

B.

Five Barbed

33.22 miles at $1,071.65 $35,700.21
Offsets 4,509.09

Total $40,209.09

3952 C.

Four Barbed (IV, p. 442)

33.22 miles at	31,903.82
Offsets	4,509.09
Total	$36,412.91

III.

Alisos Canyon

Length....1.9 miles; doubled 3.8

Hog Tight

3953 Very rough 3.8 at $1352.85	$ 5,110.72
Offsets (Vol. III, p. 193)	317.46
Total	$ 5,428.19

Five Barbed

3.8 at $1,071.65	4,072.27
Offsets	317.46
Total	$ 4,389.73

Four Barbed

3.8 miles at 960.38	3,649.41
3954 Offsets	317.46
Total	$ 3,966.87

SEVERANCE SUMMARY

I.

May K. Rindge Portion

George Riley

Affect market value 25%

R. B. Strathearn

Severance damage, 20%.....Beef production 50%

Value $174,750....20%.....$34,955.00

3955 Ed. C. Canet
Depreciation.....20%.....$5.00 an acre
William McGuire
Value $20.00 an acre.
Depreciation 20%....$4.00 an acre
Perry A. Howard
Value $40.00 an acre
Depreciation—damage—10%, or $4.00 an acre.
Alexander Culver
Value, $180,900.
3956 Damage 15% $28,016.
T. M. Camfield
Value, $161,200.
Damage, 23,128

II.

Rindge Company Portion

George Riley
Affect market value 25%
R. B. Strathearn
Severance damage 20%—Beef production
3957 50%
Value, $408,395.....20%....$81,467.
Ed. C. Canet
Value, $18. to $20. acre—
Damage 20%—$5. an acre.
William McGuire
Value, $20. an acre
Depreciation 20% or $4.00 an acre.
Perry A. Howard
Value, $40. an acre
Damage 10% or $4.00 an acre.

3958 Alexander Culver
Value, $453,860.
Damage, 15%....$ 62,642.70
T. M. Camfield
Value, 453,860.
Damage, 62,627.

III.

Alisos Canyon Road

Perry A. Howard
If main Road built, 25 c. acre to ranch,
3959 $2,783.00
If Main Road does not go through, $1. an acre, $11,333.
Alexander Culver
1%of Ranch value.
1%of $453,860....$4538.60
T. M. Camfield
$3545.

TOTAL VALUATION SUMMARY

I.

3960 May K. Rindge Portion

R. B. Strathearn.....$174,750.00
Ed. C. Canet
$18. to $20. an acre.
William McGuire $20. an acre
Perry A. Howard $40. an acre
Culver 180,900.00
Camfield 161,200.00
Gardner 89,950.00
Butterworth 182,000.00
Allen 182,000.00
Crippen 108,380.00

3961 II.

Rindge Company Portion

Strathearn 408,395.00
Canet
$18. to $20. an acre.
William McGuire $20.00 an acre
Perry A. Howard..... 453,320.00
Culver 453,860.00
Camfield
(Assessed total ranch, $416,580.)
Gardner 451,000.00
3962 Butterworth 413,475.00
Allen 415,000.00
Crippen 413,420.00

DISTANCES

(Carefully Measured and Verified on Exhibit A)

	Feet.
Los Flores to Carbon.....	3295
Carbon to Sweetwater.....	7600
	11525
3963 Sweetwater to Gate.....	85
	11610
Gate to Hill Curve.....	1925
	13535
Curve to E. of Malibu Creek.....	950
	14485
Creek Crossing.....	900
	15385

3964	Creek to Winter (Malibu Flat).....	3775
		19160
	Winter to West Line.....	4675
	Total May K. Rindge.....	23835
	Rindge Company	
	East Line to Puerco.....	2050
	Puerco to Flat Rock.....	3825
		5875
3965	Flat Rock to Corral.....	3750
		9625
	Corral to Sosto.....	3600
		13225
	Sosto to Latigo (Mountain).....	6450
		19675
	Latigo to Escondido First Crossing (Mountain)	2725
		22400
3966	Escondido to Fenced Marsh.....	3725
		26125
	Forward	26125
	Marsh to Ramirez.....	5250
		31375
	Ramirez to Walnut.....	4475
		35850
	Paralleling Walnut.....	1025
		36875

3967	Walnut to Zuma Crossing.....	6225
		43100
	Zuma Crossing to Beach.....	5450
		48550
	Up Beach to Trancas.....	3575
		52125
	Across Trancas to Beach.....	2900
		55025
3968	Beach to Steep Hill.....	4600
		59625
	Steep Hill to Encinal.....	3950
		63575
	Encinal to Bridge.....	6075
		69750
	Bridge to Lachusa.....	1300
		71150
3969	Lachusa to Alisos.....	1000
		72150
	Alisos to Nicholas.....	5050
		77200
	Nicholas to Willow.....	4675
		81875
	Willow to Sequit Crossing.....	2300
		84175

3970 Sequit to County Line..... 3750

Total Rindge Company..... 87925
Total May K. Rindge..... 23835

Grand Total.....111760

BEACH SUMMARY

May K. Rindge
Las Flores to Curve on Hill E. side of Malibu.....13,535 feet
Miles 2.57

3971 Rindge Company
Between Zuma and Trancas.. 3,575 feet
Between Trancas and Steep Hill ..... 4,600 "
Between Sequit and County Line ..... 1,800 "

Total ..... 9,975 "
Miles ..... 1.9 "
M. K. R..... 2.57miles
3972 R. Co..... 1.90 "

Total ..... 4.47 "

WATER—CANYONS—CATTLE PASSES (BRIDGES, CULVERTS)

DISTANCES

VALUATIONS—DAMAGES

May K. Rindge Portion
Total acreage.....1947
North of Road.....1875
South of Road..... 136
In Road..... 27

3973 Length of Road—4.57 miles; doubled, 9.14 miles

Boundaries

E. Los Flores Canyon
W. Line just W. of Marie
S. Pacific Ocean
N. Malibu boundary line

Canyons

Carbon (Coal)
Sweetwater
Malibu (Creek)
3974 Winter
Marie

Other Landmarks

Warehouse
Wharf
Cattle Corral

Bridges

At Carbon
At Malibu Creek

Water Supply

Carbon.....Some distance N. of
3975 Road
Sweetwater..At or just N. of Road, 2067.
Malibu Creek Crosses about where Creek widens into lake—N. and S. all seasons 2038
Marie.....Dry S. of road in Summer. None now N. of road for half a mile up.....2067, 2625-6

3976 Distances

Los Flores to Malibu Creek, about 15,000 feet W. Line

May K. Rindge to Malibu Creek, nearly 9,000 feet.

(M. K. R. Portion Contd.)

Damages

Right of Way

Camfield		$ 3,112.76
Culver		3,862.78
Gardner		2,267.37
3977 Butterworth	$2,254.82	
Impts.	153.00	2,407.82
Allen	2,417.00	
Impts.	153.00	2,570.00
Crippen	2,417.37	
Impts.	261.00	2,678.37

Parcels

Camfield	387.24
Culver	97.24
Gardner	204.81
Butterworth, Allen, Crippen	228.57

3978 Severance

George Riley	25%	
Strathearn	20%	34,955.00
Canet	20%	
"	$5. an acre	
Howard, 10% on valuation of $40.00 an acre		
Culver	15% $28,016.00	
Camfield	15% 23,128.00	
McGuire, 20%	$. an acre	
Gardner		
Allen		

3979 Butterworth
Crippen
Lewis
Russell
Fuller ..... None

Valuations

Strathearn $174,750.00
Canet $18. to $20. an acre
McGuire 20. " "
Howard 40. " "
Culver 180,900.00
3980 Camfield 161,200.00
Gardner (Items, $92,535.) 89,950.00
Butterworth 182,000.00
Allen 182,000.00
Crippen 108,380.00

Rindge Company Portion

Acreage

Total ..... 11,33 acres
North of Road 9,145.00
South of Road 2,067.88
In Road 120.12

3981 Length of Road 16.61 miles; doubled 33.22 miles

Boundaries

E. by W. line M. K. Rindge
W. by Ventura County line
S. by Pacific Ocean
N. by Malibu Boundary line

Canyons (and distances apart)

Puerco....2050 ft. from E. line
Flat Rock....3825 ft. from Puerco
Corral....3750 ft. from Flat Rock
Sosto....3600 ft. from Corral

3982 Latigo....6450 ft. from Sosto
Escondido....2725 ft. from Latigo
Fenced Marsh (not can,)....3725 ft. from Escondido
Ramirez....5250 ft. from Fenced Marsh
Escondido to Ramirez....8975 ft.
Walnut....4475 ft. from Ramirez
Zuma (Crossing) including 1025 feet paralleling Walnut on West Bank, 7350 ft. from Walnut
Total Ramirez to Zuma Crossing....11825 ft.

3983 Beach....5450 ft. from Zuma Crossing
Up Beach to Trancas....3575 ft. from Beach Point
Across Trancas to Beach....1900 ft. from E. side Trancas
Zuma Crossing to Trancas Crossing....9925 ft.
Beach to Steep Hill....4600 ft. from W. Side Trancas
Encinal....3950 ft. from Steep Hill
Encinal....9550 ft. from Trancas Crossing

3984 Bridge....6075 ft. from Encinal
Lachusa....1500 ft. from Bridge
Alisos....1000 ft. from Lachusa
Nicholas....5050 ft. from Alisos
Willow....4675 ft. from Nicholas
Sequit Crossing....2300 ft. from Willow
County Line....3750 ft. from Sequit Crossing
Willow to County Line....6050 ft.

Bridges—Cattle Ways:
None at Puerco or Flat Rock Corral

3985 Solstice
Latigo (Cattle Culvert)
Escondido
Ramirez
None at Walnut
(R. Co. Portion—Contd.)
Bridges (Condt.)
Zuma (Cont.)
Trancas.
None at Steep Hill
Encinal
3986 Bridge
Lachusa (Present Bridge)
Los Alisos
Nicholas
None at Willow
Sequit
Distances Between Bridges
East Line to Corral..... 9625 ft.
(Note— Distance from Corral East to Malibu Creek more than 18,000 feet.)
3987 Corral to Solstice..... 3600 ft.
Solstice to Latigo..... 6450 ft.
Latigo to Escondido..... 2725 ft.
(Note)— Solstice to Escondido 9,75 feet.)
Escondido to Ramirez..... 8975 ft.
Ramirez to Zuma Creek....11825 ft.
Zuma to Trancas..... 9925 ft.
Trancas to Encinal..... 9550 ft.
Encinal to Bridge..... 6075 ft.
Bridge to Lachusa..... 1500 ft.

3988

Lachusa to Alisos.....	1000	ft.
Alisos to Nicholas.....	5050	ft.
Nicholas to Willow (No Bridge	4675	ft.
Willow to Sequit.....	2300	ft.
Sequit to County Line.....	3750	ft.

(Note— Willow to County line 6050.
Note—Nicholas to County Line 10,725 feet.)

Beach Stretches

Between Zuma and Trancas	3575	feet
" Tranca and Steep Hill	4600	"
" Sequit and County Line	1800	"
Total	9975	"

Miles, 1.9

3989

Prepared by Mr. Vallee, one of the attorneys for plaintiff.

FENCING

Offsets or Angles Main Road

3990

May K. Rindge Portion

10 of 5 ft.....	50 ft.
14 of 10 ft.....140	"
10 of 15 ft.....150	"
7 of 20 ft.....140	"
3 of 25 ft..... 75	"
5 of 30 ft.....150	"
1 of 40 ft..... 40	"
1 of 45 ft..... 45	"

Total number of feet....790 ft. at 500 a mile—approximately $85.00

3991 FENCING

Offsets or Angles Main Road

Rindge Company Portion

106 of 5 ft..... 530 ft.
87 of 10 ft..... 870 "
39 of 15 ft..... 585 "
41 of 20 ft..... 820 "
25 of 25 ft..... 625 "
44 of 30 ft.....1320 "
10 of 35 ft..... 350 "
3992 5 of 40 ft..... 200 "
6 of 45 ft..... 270 "
8 of 50 ft..... 400 "
3 of 55 ft..... 165 "
1 of 60 ft..... 60 "
1 of 65 ft..... 65 "
2 of 75 ft..... 150 "

Total number of feet...6410 " or approximately 1-1/5 mi., at $500 a mi.—$600.00

3993 FENCING

Offsets or Angles Los Alisos Canyon Road

Rindge Company

1 of 5 ft..... 5 ft.
18 of 10 ft.....180 "
1 of 15 ft..... 15 "
8 of 20 ft.....160 "
1 of 25 ft..... 25 "

Total No. of ft.....385 ft. at $500 a mi., approximately $40.00

Prepared by Mr. Vallee, one of the attorneys for the plaintiff:

FENCES—MRS. RINDGE

Gate to Malibu

Fence, North side.....14,485 ft.
None, South side, along beach.....

Malibu to Winter

Fence, North side..... 4,675 ft.
Fence, South side

Winter to Marie

Fence, North side..... 4,675 ft.
None, South side, Bluff on South side.
Total fencing both sides in.....28,510 ft.
May K. Rindge's less offsets..... or
5.04 mi. at $500
$2520.

RINDGE COMPANY

Marie to Sosto

Fence, North side.....13,225 ft.
Fence South side

Sosto to West of Zuma

Hog tight at Zuma

Fence, North side.....35,325 ft.
Fence, South side

West of Zuma to Trancas

Hog tight at LaChusa

Fence, North side..... 3,575 ft.
Fence, South side

At Trancas

Both sides..... 2,900 ft.

West of Trancas to Steep Hill

Fence, North side..... 4,600 ft.
None, South side

3997 Steep Hill to West of Sequit

Fence, North side.....24,550 ft.
Fence, South side

Sequit to Ventura Line

Fence, North side..... 3,750 ft.
None, South side
Total fencing on both sides in Rindge Co. less offsets 163,925 ft. or 31.05 miles at $500 $15,525.
Total fencing on Los Alisos less offsets 3.8 miles
3998 Total fencing in Main case less offsets 36.09 "
at $500 $18,045.
Total fencing in Los Alisos case less offsets at $500 $1,900 3.8 "

That thereafter, on said 18th day of December, 1918, the jury returned into court and rendered its respective verdicts, duly signed by its foreman, in each of these cases, as follows:

3999 In the main road case, No. B-43572:

(Title of Court and Cause.)

1—What at the date of the trial, September 30, 1918, was the actual market value of the land sought to be taken from defendant May K. Rindge?

Answer. (Forty foot strip $2324.70
(
(Additional parcels 228.57
Total $2553.27

4000 2—What, at said date, was the actual market value of the improvements pertaining to the realty on the land sought to be taken from defendant May K. Rindge?

Answer. $153.00

3—Will the remaining portion of defendant May K. Rindge's land, not sought to be taken, be damaged by reason of the severance therefrom of the part which is sought to be taken?

Answer. Yes.

4001 4—If your answer to the last interrogatory was in the affirmative, what do you find the amount of such severance damage to be?

Answer $1162.35

5—How many miles of fencing will it be necessary to construct on the property of defendant May K. Rindge by reason of the taking and use for public highway purposes of the land sought to be taken from defendant May K. Rindge?

4002 This question must be answered in the light of the concession of the plaintiff as to the necessity of a fence which I have quoted in the instructions given.

Answer. Six and 6/10 miles.

6—What kind of fencing will be suitable to be constructed on the land of defendant May K. Rindge by reason of such taking and use of her land sought to be taken?

Answer. Thirty six inch woven wire with two barbed wires above with suitable posts.

4003 7—What will be the cost of such fencing on the land of defendant May K. Rindge?

Answer $550.00 per mile, or total $3,630.00

8—What, at the date of the trial, September 30, 1918, was the actual market value of the land sought to be taken from defendant Rindge Co.?

Answer (Forty foot strip $6,456.10
(
(Additional parcels 1,278.77
4004 Total $7,734.87

9—What, at said date, was the actual market value of the improvements pertaining to the realty of the land sought to be taken from defendant Rindge Company?

Answer $1,234.50

10—Will the remaining portion of defendant Rindge Company's land, not sought to be taken, be damaged by reason of the severance there-
4005 from of the part which is sought to be taken?

Answer Yes.

11—If your answer to the last interrogatory was in the affirmative, what do you find the amount of such severance damage to be?

Answer $2,696.00

12—How many miles of fencing will it be necessary to construct on the property of defendant Rindge Company by reason of the taking and use for public highway purposes of the

4006 land sought to be taken from defendant Rindge Company?

Answer—29 miles.

13—What kind of fencing will be suitable to be constructed on the land of defendant Rindge Co. by reason of such taking and use of its land sought to be taken?

Answer—36 inch woven wire with two barbed wires above with suitable posts.

4007 14—What will be the cost of such fencing on the land of defendant Rindge Company?

Answer $650.00 per mile $18,850.00

15—What, at the date of the trial, September 30, 1918, was the actual market value of the land sought to be taken from defendant Hueneme, Malibu and Southern Railroad Co.?

Answer (Forty foot strip $59.06
(
(Additional parcels 7.69
Total $66.75

4008 16—What, at said date, was the actual market value of the improvements pertaining to the realty on the land sought to be taken from defendant Hueneme, Malibu and Southern Railroad Company?

Answer $00.00

17—What, at said date, was the actual market value of the land sought to be taken from the defendant, Hueneme, Malibu and Port Los Angeles Railroad Company?

Answer $00.00

4009 To the said verdict thus rendered (except as to the form of the same), and to each and every part thereof, and to each and every finding of the jury therein, the defendants in the said main road case, No. B-43,572, then and there duly excepted.

Exception No. 73.

In the Alisos Canyon case, No. B-59,443:

(Title of Court and Cause.)

4010 1—What, on the 24th day of January, 1918, was the actual market value of the land sought to be taken from defendant Rindge Company?

Answer (Forty foot strip $184.00
(
(Additional parcels 220.00
Total $404.00

2—Will the remaining portion of defendant Rindge Company's land, not sought to be taken, be damaged by reason of the severance there-
4011 from of the part which is sought to be taken?

Answer No.

3—If your answer to the last interrogatory was in the affirmative, what do you find the amount of such severance damage to be?

Answer None

4—How many miles of fencing will it be necessary to construct on the property of defendant Rindge Company by reason of the taking and use for public highway purposes of the land sought to be taken from defendant Rindge Com-

4012 pany? This question must be answered in the light of the concession made by plaintiff, which I have quoted in the instruction.

Answer 3.87 miles

5—What kind of fencing will be suitable to *the* constructed on the land of defendant Rindge Company by reason of such taking and use of its land sought to be taken?

Answer. Thirty-six inch woven wire with
4013 two barbed wires above, with suitable posts.

6—What will be the cost of such fencing on the land of defendant Rindge Company?

Answer $675.00 per mile—total $2612.25

What, on the 24th day of January, 1918, was the actual market value of the land sought to be taken from Hueneme, Malibu and Port Los Angeles Railway Company?

Answer—None.

To the said verdict thus rendered (except as
4014 to the form of the same), and to each and every part thereof, and to each and every finding of the jury therein, the defendant in the said Alisos Canyon road case, No. B-59,443, then and there duly excepted.

Exception No. 74.

That thereafter, and without the taking of any further evidence, the said cases and each of them were argued and submitted to the court for its findings and decision on each and all and every

of the remaining issues therein and in each thereof.

That pending his decision in said cases, the court, by and with the consent of counsel for all parties, and accompanied by the officers of the court and by the attorneys for all parties, and by the witness F. B. Scotton, made a trip of two days' duration, principally on horseback, over the various roads and trails referred to in the testimony, to-wit:

First: Commencing at Triunfo post office, by automobile to a point on the so-called Triunfo-Decker near the foot of Malloy Hill; there the party left the automobiles and proceeded on horseback to Charlie Decker's place near the head of Alisos Canyon, traveling the so-called Triunfo-Decker road and passing Vaughn's place, X-5 on the map, Exhibit 6, and the school house. From Decker's place they rode southerly to the northerly grant (boundary) line of the Malibu Ranch at a point near the center-line stake of the end of the survey for the Alisos Canyon road, which stake was shown to them. Returning, after reaching the point X-5, Vaughn's place, the party turned off to the right into the so-called Cornell-Decker road, proceeding northeasterly past Shirley Slide and Nigger Hill on said road to Cornell. At Cornell the horses were abandoned, and the party proceeded by automobiles along the Cor-

4018 nell-Triunfo road into the Russell Ranch and to the point of commencement.

On the second day the party went by automobile up the Triunfo-Decker road to a point in the upper Triunfo Canyon where the Yerba Buena trail, approximately indicated by the large red dots on Exhibit 6, branches off from the Triunfo-Decker road; from there they proceeded on horseback along the trail in question in a southwesterly direction up Triunfo Canyon to
4019 a point near its upper end in the mountains, and then on over Triunfo Pass, along the trail and across various canyons until they reached the Yerba Buena settlement, passing the school house and several of the settlers' places to the place of John Fitzpatrick. From the Fitzpatrick place they commenced their return trip, passing over the ridge or hogback to the rear and westerly of said place; then down into Serrano Canyon
4020 and along that canyon to its junction with Big Sycamore Canyon, and down Big Sycamore Canyon to the Hueneme county road on the Borchard Ranch. At this point the horses were abandoned, and the party returned to Los Angeles in automobiles.

"Thereafter on the 10th day of December, 1918, the following stipulation was entered into and filed with the clerk of the court:

4021 'Title of Court and Cause.

'STIPULATION AS TO ENTRY OF JUDGMENT AND SERVICE OF COST BILL.

'It is hereby stipulated and agreed by and between the respective parties to the above entitled action through their respective counsel:

First: That the judgment in the above entitled cause need not be entered within twenty-four (24) hours after the rendition of the ver-
4022 dict, but that such judgment may be entered upon or after the filing of the findings of fact and conclusions of law by the court in the same manner as in cases tried by the court without a jury;

Second: That the memorandum of costs and disbursements need not be served or filed within five (5) days after the verdict, but that the same may be served and filed within five (5) days after notice that the findings of fact and con-
4023 clusions of law made by the court have been filed.

Dated December 10, 1918.

A. J. HILL,
County Counsel;
CHARLES S. BURNELL,
Deputy County Counsel;
PAUL VALLEE,
Deputy County Counsel,
Attorneys for Plaintiff.
ANDERSON & ANDERSON,
NATHAN NEWBY,
Attorneys for All Defendants Who Have Filed Answers Herein."

4024 That thereafter, and on January 11, 1919, the court rendered its decision in favor of the plaintiff and against the defendants, which decision was in words and figures following, to-wit:

"In the Superior Court of the state of California, in and for the county of Los Angeles.

County of Los Angeles, plaintiff, vs. The Rindge Company *et al.*, defendants.

No. B-43572.

4025 No. B-59443.

No. B-65893.

DECISION ON QUESTIONS OF NECESSITY.

"The county of Los Angeles instituted the above numbered three separate special proceedings to condemn for public use, to-wit, for road purposes, certain property of the defendants aforesaid. The property sought to be condemned lies entirely within the Rancho Malibu,

4026 is situated in the county of Los Angeles, state of California, and consists of three strips of land each forty feet in width, and sufficient contiguous parcels of land at the sides of said strips to build three roads, each to grade twenty-two feet wide. The proceedings, while not consolidated, were, by agreement of the parties, tried simultaneously. For convenience they have been called throughout the trial 'The Main Malibu Road Case,' 'The Los Alisos Road Case' and 'The Beach Road Case,' respectively. A jury

was regularly impaneled and in each case the issues of compensation for the taking of said property have been determined by said jury by special findings made and filed herein. There remain three questions for decision by the court. These questions are: First, whether there existed public necessity for the proposed roads at the respective times when the board of supervisors regularly passed resolutions of necessity and directed the county counsel to begin condemnation proceedings; second, whether the property sought to be condemned is necessary for the proposed roads, and, third, whether the proposed roads are planned or located in the manner which will be most compatible with the greatest public good and the least private injury.

"These questions usually in eminent domain proceedings are determined by the legislative branch of government, and when regularly determined by it, are not thereafter subject to judicial inquiry or review; but inasmuch as it is conceded that the board of supervisors in each of these cases have failed to pursue the course required by sections 2681 and 2698 inclusive of the Political Code, which is the usual method adopted by counties in laying out new roads and taking property necessary therefor, we have held during the trial that they become judicial questions in each of these cases.

4030 "Defendants' counsel have earnestly and with great force contended that these causes should be dismissed because of the failure of the board of supervisors to take such steps as are required by the aforesaid sections of the Political Code. They argued that such steps were mandatory in all cases and provided the sole and exclusive method or scheme under which counties in California can lay out new roads. The court cannot agree with this contention and during the trial
4031 assigned fully its reasons therefor. To repeat them would prolong this statement uselessly. Suffice it to say that we believe that there are two independent alternative methods provided by the statutes of California whereby counties, through their respective boards of supervisors, can lay out and open new roads and acquire lands therefor by condemnation proceedings, one being the method devised by said sections of
4032 the Political Code and the other being that taken by plaintiff in each of these cases, to-wit, by direct condemnation proceedings under title 7, part 3, of the Code of Civil Procedure under authority of the power conferred on boards of supervisors by subdivision 4 of section 2643 of the Political Code.

"When the board of supervisors adopts the scheme provided by section 2681 *et seq.* of the Political Code, its action in determining the three questions mentioned in the beginning of

this statement is final and conclusive on the courts because section 1241 of the Code of Civil Procedure provides that before property can be taken under the right of eminent domain, it must appear 'First, that the use to which it is applied is a use authorized by law; second, that the taking is necessary to such use, provided when the legislative body of the county * * * shall by resolution or ordinance adopted by vote of two-thirds of all its members have found and determined that the public interest and necessity require the acquisition, construction or completion by such county of any proposed public utility or any public improvement and the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury.' But when, as in the cases at bar, the board of supervisors act directly under title 7 of part 3 of the Code of Civil Procedure, by virtue of the power granted it by subdivision 4 of section 2643 of the Political Code, their action in determining the three questions by duly passing a sufficient

ordinance or resolution is not conclusive evidence of their existence, but merely establishes them in a *prima facie* manner. Accordingly we ruled in each of these cases that when plaintiff proved the required passage, which it did, of the resolution of the board of supervisors declaring that there existed a public necessity for the establishment of these roads in the manner proposed, there arose *eo instante* a presumption of such public necessity which could be overthrown only by clear and convincing proof to the contrary, and that the burden of overthrowing and removing the presumption rested on the defendants. While the exact question now under discussion has never been considered or decided by the Supreme or Appellate Courts of our state, there is language in City of Pasadena v. Stimson, 91 Cal. 238, and County of Riverside v. Alberhill Coal & Clay Co., 34 Cal. App. 538, which supports this court's view of the question. On principle it seems to us that it would be unreasonable to hold that in every case where a new road is necessary or desirable the board of supervisors must adopt the expensive and dilatory viewers' method provided by sections 2681 *et seq.* of the Political Code although it is positively known by them before any steps whatever are taken to lay out a new road that the landowners, whose property must be taken to build the road, will under no circumstances con-

4039 sent to it being built and will not accept any award that might be made by the viewers for the land necessary to be taken, but will require condemnation proceedings in court.

"The evidence in these cases shows such to be defendants' attitude. Mrs. May K. Rindge, who either in her individual capacity, or as the active head and director of the Rindge Company, a corporation, controls and manages the
4040 entire Malibu Ranch properties, has testified that she did not want a public road through the ranch and that she has always opposed the efforts of the public authorities to establish one. Under such a position nothing could be accomplished by pursuing the viewers' method under sections 2681 *et seq.* of the Political Code except the loss of time and an extravagant and unjustifiable expenditure of public money. Under our construction of the law in these
4041 cases, the defendants have lost no right or remedy which they could have asserted if the viewers' method aforesaid had been adopted by the board of supervisors.

"With the law thus declared, we have made a careful review of the evidence, which is voluminous and which was elicited by able and astute counsel with great diligence. In order to better understand and analyze the evidence we have made several excursions to the Malibu Ranch

4042 and have traversed the mountain regions to be affected by these proposed roads, inspecting on such tours not only the routes and termini of the proposed roads, but the present ways of travel available to the settlers to the north and west of the Malibu Ranch as well. Our conclusion is that as to the main Malibu road and the Los Alisos road, the three questions submitted for decision must be answered as contended by the plaintiff.

4043 "The proposed main road commences at the easterly end of the Malibu Ranch, which is at Los Flores Canyon where said canyon terminates on the beach of the Pacific Ocean, and it traverses in a general westerly direction the entire length of said ranch in Los Angeles county, a distance of about twenty-two miles, terminating at the Ventura county line. It will be, if constructed, a prolongation or continuation

4044 of the present popular and muchly traveled county highway that extends along the shore of the ocean from the city of Santa Monica to Los Flores Canyon, a distance of about ten miles.

"The defendants have at the present time a road through their ranch for the entire distance of the proposed main Malibu road. This private road is constantly used by the owners and employees of the ranch and by such other persons as obtain permission from the owners to travel over it. This road or at least much of it

4045 was formerly and for many years traveled by many farmers and settlers without hindrance. These settlers had located to the north and west of the ranch on government land in Los Angeles and Ventura counties, some of them taking up their claims and farming them as far back as the early eighties, during which time they constantly used roads across the ranch, going from their homes to the markets and cities of
4046 Santa Monica and Los Angeles and vicinity. The proof in this case showed that many of these folks had taken up their claims under the assumption that they had a right to cross the Malibu Ranch by means of the roads thereon. In this they were mistaken, for our Supreme Court in April, 1917, decided that there was no public highway across the Malibu Ranch and that the roads which they had been using thereon in order to reach their homes and farms
4047 were private roads and all outsiders using a way or road on the ranch were declared to be trespassers or licensees. (People v. Rindge, 174 Cal. 743.) Shortly after this decision the owners of the ranch destroyed with dynamite certain portions of road which had been used as aforesaid through their property and placed locked gates and fences at such points thereon so as to effectively obstruct passage to the east, north and west. It has been shown since the

4048 closing of these ways many of the settlers and their families have been compelled to abandon their places because of their inaccessibility and the impossibility of bringing their crops to market. It is true that the settlers whose places are located to the north of the Malibu Ranch or in what has been described throughout the case as the Decker region, can reach their lands through trails and roads connecting with the
4049 state highway running from Los Angeles to Ventura, and that since the closing of the Malibu Ranch to travel they have done so. These ways, however, have been shown to be for the greater part across and through private property and are generally circuitous, narrow, steep and wholly inadequate for loaded motor or animal drawn vehicles. The contention of defendants that these ways furnish ample means of travel to the settlers in the so-called Decker region or
4050 at least that they could be made satisfactory roads by the county spending much less money than will be required to construct and maintain the proposed roads, is in our opinion not borne out by the evidence. Moreover, it has been shown that under the Supreme Court decision in People v. Rindge, *supra*, they would after improvement be but private roads, the permission to use them being revocable any time by the owners of property through which they run.

"The proof showed that many of the grades on the routes now used by the Decker region settlers are from twenty per cent to thirty per cent, and that by proper engineering and road construction they could not be reduced to any extent, whereas the average grade on both the proposed main Malibu and Los Alisos roads is but eight per cent and the maximum grade, which is on the proposed Los Alisos road for a short distance only, is but fourteen per cent.

"It is further claimed that the proposed Los Alisos road terminating at the northern line of the ranch property where it joins the property of Ernest Decker will accommodate, and be of no use to any persons except the Decker family. It is reasonable to assume, however, that the authorities will later establish a continuation of this road through the Decker property so as to accommodate the other settlers and families living in the Decker region, who, by the way, are now permitted to use at will the private roads across and through the Decker properties.

"My conclusion as to the settlers in the so-called Decker region is that at the present time there is no adequate, sufficient or satisfactory road or way by which they can haul provisions or products to or from their places and that the proposed main Malibu road, in conjunction with the proposed Los Alisos road, which is a lateral leaving the main road near Los Alisos Canyon

4054 and running northerly along the easterly side of said canyon to the northern line of the Malibu Ranch, will supply their need for a road to and from the markets of Los Angeles, in a manner that will be most compatible with the greatest public good and the least private injury.

"Much testimony was taken as to the needs of the farmers and ranchers of the Yerba Buena Canyon for a road. Yerba Buena Canyon lies
4055 in Ventura county, a few miles west of the western terminus of the proposed main Malibu road, and the ordeals of the inhabitants of this canyon, since the closing of the Malibu Ranch to travel in 1917, have been many. They have been in an almost unbearable position as far as road conditions are concerned. Attracted by the fertility of the soil, many of these people migrated into this canyon many years ago and by industry and frugality the canyon has been
4056 transformed into a veritable garden, dotted by orchards and farms. Like their neighbors in the so-called Decker region, they settled in the Yerba Buena district under the belief that they had the right to use a road across the Malibu Ranch which connected in Ventura Canyon with another old established and used road known as the Jaspar-Thomas-Mondel road, which led directly into Yerba Buena Canyon, and provided the settlers with a road to and from the city of Los Angeles. These roads they traveled and

used for many years and they were the only roads to their places adequate for wagons or motor vehicles. At the present time there is no wagon or vehicle road from their places to Los Angeles, or any other place, and the only method of getting the necessities of life or provisions of any kind is by pack animals from the state highway several miles to the north, and over high mountain passes, and almost perpendicular mountain trails. It is as to these Yerba Buena settlers that we believe the greatest necessity exists for the construction of the proposed main Malibu road. They are less fortunate than the inhabitants of the so-called Decker region, for the last mentioned people can, by expert horsemanship, or unusual ability as motorists, reach some of the places in that district by wagon or automobile, but the Yerba Buena inhabitants must, in order to reach any place on earth, 'steal across private property,' and up and down steep mountain passes which are wholly inadequate and unsafe for animal-drawn or motor-vehicles. It is difficult to conceive of any region that is more isolated and inaccessible than the Yerba Buena district since roads to and across the Malibu Ranch were closed in 1917. The farms and orchards, although apparently very productive and well kept, are practically worthless because of the utter impossibility of marketing the products.

4060 "It is urged by defendants that no necessity exists for a road from Los Angeles along the beach through their property to these people because, they assert, they can be adequately accommodated by a road built from the state highway to the north, either through Sycamore Canyon and across the mountains to Yerba Buena Canyon or over the high Triunfo Pass. We are satisfied neither of the routes suggested
4061 would be adequate and that no route would supply the necessity for a road as thoroughly and properly as the proposed main Malibu road.

"The claim of defendants that because geographical lines have placed these people and their homes and farms in Ventura county, the county of Los Angeles owes them no consideration, is in our opinion without merit. Assuming without deciding that as residents of Ventura county they have no claim on the county of
4062 Los Angeles, the residents of the last mentioned county have undoubtedly the right to require the building of a road whereby they can visit and have business intercourse with the Yerba Buena farmers. This they are attempting to do by these proceedings.

"It has been held by our Supreme Court that not only present conditions of a locality may be considered in determining the necessity for a road, but also those which may reasonably be anticipated. (Central Pac. Ry. Co. v. Feldman,

4063 152 Cal. 304.) Therefore, because there is at present no road of any kind from the Yerba Buena settlement in Ventura county to the western terminus of the proposed main Malibu road, furnishes no reason to hold that the main road is unnecessary. It is proper and fair to anticipate that the authorities of Ventura county will establish a road from Yerba Buena to the western terminus of the proposed main Malibu road.

4064 "But we believe that under the evidence a legal public necessity has been shown for the main Malibu road, aside from its need as a highway of commerce to the settlers and farmers of the Decker and Yerba Buena districts. If an improvement is useful and convenient to the public and is a benefit of sufficient importance to warrant the public in incurring the expense of making it, it is a public necessity. The public necessities change with the progress of

4065 society and here in Southern California especially the development and general use of motor vehicles has created new public necessities which demand and should receive the attention and action of the governmental authorities. If for no other purpose than to afford outdoor life and recreation to the people of Los Angeles county by a scenic highway, we believe the proposed main Malibu road to be a public necessity. As proposed, said road traverses a stretch of land, the natural beauty of which is unique and di-

4066 verse. To the south can be seen the broad Pacific, with its variegated waters and many shaped islands, while immediately to the north stand the majestic Santa Monica Mountains; up hill and down dale the road wends its way through wooded canyons and across verdant mesas, ever revealing to the traveler a panorama of rare charms. It is easy to conceive the pleasure and recreation and the incalculable benefit that will be afforded the public by the building of this
4067 main Malibu road. A public necessity for a road may exist although the road may serve no purpose of business or duty. It is sufficient that there is an exigency for the exercise of a lawful public right, though it be only for the purpose of amusement or recreation, as a way for travel to a public park or common, to a place of historic interest or remarkable or pleasing natural scenery.

4068 (Higginson v. Mahant etc., 11 Allen 535.)

* * * "The testimony of H. I. Comely, the deputy county surveyor, who ran the survey and established the proposed right-of-way, showed that the lands sought to be condemned in the main Malibu road case and Los Alisos road case are necessary to establish the proposed roads and demonstrated to our mind that each of said roads is planned in a manner compatible with the greatest public good and the least private injury. No effort has been made to controvert

this testimony and it is, therefore, conclusive in these cases.

"It has been urged by defendants that because these roads will cost the taxpayers of Los Angeles county several hundred thousand dollars to build, this court should refuse to decree condemnation herein. We believe that such is not the law. The question as to the expediency or advisability of expending sufficient public money to build these roads is one of policy for the legislative branch of government to decide and is not a proper question to be decided by the court in these cases.

"Notwithstanding the decrees of condemnation hereby ordered in the main Malibu road case and Los Alisos road case, it may yet appear to the supervisors inadvisable or inexpedient to build the proposed roads. Until the jury's award in these cases they could have no knowledge as to the cost of the proposed roads to the taxpayers. They are now fully informed thereof and can proceed with or abandon the project according to their sound discretion and judgment.

"The defendants' motion to strike out testimony, which was made and submitted during the trial, is denied *in toto*. A judgment and decree of condemnation is ordered for the plaintiff in the main Malibu road case and Los Alisos road case, in accordance with the prayer of its com-

4072 plaints therein, respectively, * * *. Counsel will prepare findings and decrees accordingly.

Dated January 11th, 1919.

PAUL J. McCORMICK,
Judge."

That thereafter, and on the 6th day of February, 1919, a notice of such decision was served upon counsel for defendants, and filed with the clerk of the court, which notice of decision is in
4073 words and figures following, to-wit:

"Title of Court and Cause.

NOTICE OF DECISION.

"*To the Defendants Herein and to Messrs. Anderson and Anderson, and Nathan Newby, Their Attorneys:*

"You, and each of you, will please take notice that the findings of fact and conclusions of law in the above entitled cause, duly signed by the
4074 court, were filed herein on the 30th day of January, 1919, and that the interlocutory judgment of condemnation herein was signed by the court and duly filed in the office of the county clerk of Los Angeles county on the 5th day of February, 1919.

Dated this 6th day of February, 1919.

A. J. HILL,
County Counsel;
CHARLES S. BURNELL,
Deputy County Counsel, and
PAUL VALLEE,
Deputy County Counsel."

That thereafter, and on the 21st day of February, 1919, a stipulation was entered into and filed, which stipulation is in words and figures following, to-wit:

"Title of Court and Cause.

"STIPULATION AS TO COST BILL.

"It is hereby stipulated that all of the costs of the defendants in the above-entitled action may be deemed to have been expended by the defendant, Rindge Company, and that no memorandum of costs and disbursements need be filed by any of the other defendants, and that the expenditures and costs allowable by law of all of the defendants may be included in the memorandum of costs and disbursements of the defendant, Rindge Company, and judgment therefor be entered in behalf of said defendant, Rindge Company.

Dated February 21st, 1919.

A. J. HILL,
County Counsel;
CHARLES S. BURNELL,
Deputy County Counsel;
PAUL VALLEE,
Deputy County Counsel,
Attorneys for Plaintiff.
ANDERSON & ANDERSON,
NATHAN NEWBY,
Attorneys for Defendant."

4078 Thereafter, to-wit: on January 30th, 1919, the court in said main road case made and filed its findings of fact and conclusions of law in favor of the plaintiff and against the defendants and ordered that judgment be entered accordingly, which findings of fact and conclusions of law are a part of the judgment roll in said case.

That thereafter, to-wit: on February 5th, 1919, the court made and filed its so-called "Interlocutory Judgment of Condemnation" in said
4079 suit, which said interlocutory judgment in said main road case was thereafter on February 11th, 1919, duly docketed and entered by the clerk of this court, and is a part of the judgment roll in said main road case.

"That thereafter, and on the 15th day of March, 1919, plaintiff served and filed a notice of deposit in words and figures following, to-wit:

4080 'Title of Court and Cause.

'NOTICE OF DEPOSIT OF AMOUNT OF JUDGMENT WITH CLERK OF COURT.

'To the Defendants, Rindge Company, a Corporation, May K. Rindge and [illegible] Hueneme, Malibu and Southern Railwa[illegible]ompany, a Corporation, and to Their Attorneys, Messrs. Anderson & Anderson and Nathan Newby, Esq.:

"You, and each of you, will please take notice that on this 18th day of March, 1919, the

County of Los Angeles, plaintiff herein, has deposited with H. J. Lelande, county clerk of the county of Los Angeles and *ex-officio* clerk of the Superior Court of said county, the amount of the judgment in the above-entitled action for said defendants respectively as follows:

'For the defendant, Rindge Co., a corporation, the sum of $30,515.37, being the amount required to be paid to said defendant by the judgment in the above entitled action; and $2,381.38, being the amount fixed as costs in said action.

'For the defendant, May K. Rindge, the sum of $7,498.62, being the amount required to be paid to said defendant by the judgment in the above-entitled action.

'For the defendant, Hueneme, Malibu & Southern Railway Company, a corporation, the sum of $66.75, being the amount required to be paid to said defendant by the judgment in the above-entitled action.

Dated Los Angeles, Cal., March 15, 1919.

A. J. HILL,
County Counsel;
CHARLES S. BURNELL,
Deputy;
PAUL VALLEE,
Deputy.'"

That thereafter and within the time allowed by law the defendants in said main road case

served and filed their notice of intention to move for a new trial thereof, in the words and figures following, to-wit:

(Title of Court and Cause.)

"No. B-43,572.

"NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL.

"To the Plaintiff, and to Messrs. A. J. Hill, County Counsel; Paul Vallee, Deputy County Counsel, and Charles Burnell, Deputy County Counsel, Its Attorneys:

"You and each of you will please take notice that the defendants in the above-entitled action intend to move the court to vacate and set aside the verdict of the jury upon the issues submitted to the jury, and the decision of the court as to those issues decided by the court, and to grant a new trial of said action upon the following grounds:

"1. Insufficiency of the evidence to justify the verdict of the jury on the issues submitted to the jury, and insufficiency of the evidence to justify the decision of the court as to those issues decided by the court;

"2. That said verdict of the jury and said decision of the court are against law;

"3. Errors in law occurring at the trial and excepted to by said defendants.

4087 "Said motion will be made upon the minutes of the court in said action.

"Dated February 15, 1919.

"ANDERSON & ANDERSON,

"NATHAN NEWBY,

Attorneys for Said Defendants."

That thereafter, and within the time allowed by law, the defendants, pursuant to said notice of intention, moved the court as therein stated
4088 and upon each and all and every of the grounds therein stated; and said motion for a new trial in said main road case was thereupon argued and submitted to the court for its decision; and thereafter on April 3rd, 1919, the court in said main road case made and caused to be entered the following order in the matter of said motion for a new trial, to-wit:

"No. B-43,572.

4089 Thursday, April 3rd, 1919.

County of Los Angeles vs. The Rindge Co. *et al.*

The motion for a new trial heretofore heard and submitted. Defendants' motion for a new trial herein is denied, except as to the issue of suitable fences, which issue under a stipulation and concession submitted to the jury herein, under this concession it was the duty of the jury to have found that no less than 31.5 miles of fencing was necessary on the land and prop-

erty of defendant Rindge Company, a corporation, and inasmuch as the jury failed to so find, a new trial on the issue of necessary suitable fences will be ordered unless within two (2) days from this date the plaintiff herein files with the clerk of this court consent in writing to the allowance of 31-5/10 miles of fencing at the rate and of the kind found by the jury herein. If such written consent is filed as aforesaid, the motion of defendants for a new trial is denied *in toto.*"

To this order and ruling and to the whole thereof and to each and every part thereof specifically, the defendants in said main road case then and there excepted.

Exception No. 75.

That thereafter, but on the said April 5th, 1919, the attorneys for the plaintiff in said main road case served upon the attorneys for the defendants and filed with the clerk of this court a document entitled "Stipulation and Election," which was and is in the words and figures following, to-wit:

(Title of Court and Cause.)

"No. B-43,572.

STIPULATION AND ELECTION.

"Plaintiff, County of Los Angeles, hereby stipulates, agrees and consents to the allowance of 31.5 miles of 36 inch woven wire fence, with

two barb wires above, and suitable posts, at the rate of $650 per mile, as necessary on the land and property of the defendant, Rindge Company, a corporation, by reason of the taking and use for public highway purposes of the land sought to be taken from the defendant Rindge Company, and hereby stipulates and agrees to deposit with the clerk of the court for the defendant Rindge Company, in addition to the amounts heretofore deposited, the sum of $1625.

"Plaintiff, County of Los Angeles, hereby stipulates, agrees and elects to build and construct 6.6 miles of 36 inch woven wire fence, with two barb wires above, and suitable posts, on the property of the defendant May K. Rindge, as specified in the verdict of the jury in the above-entitled action, which are the fences for which damages have been assessed in said action in favor of the defendant May K. Rindge; and

"Plaintiff, County of Los Angeles, hereby agrees, stipulates, agrees and elects to build and construct 31.5 miles of 36 inch woven wire fence, with two barb wires above, and suitable posts, on the property of the defendant Rindge Company, a corporation, as specified by the verdict of the jury and the order denying the motion for a new trial in the above-entitled action, which are the fences for which damages

4096 have *have* been assessed in said action, in favor of defendant Rindge Company.

Dated Los Angeles, California, Apr. 4, 1919.

"A. J. HILL,
County Counsel;
C. S. BURNELL,
Deputy County Counsel;
PAUL VALLEE,
Deputy County Counsel;
"Attorneys for Plaintiff."

4097

To the filing of said "Stipulation and Election," and to the said "Stipulation and Election" and to the whole and to each and every part thereof, the defendants in said main road case then and there excepted.

Exception No. 76.

That annexed to and filed with said "Stipulation and Election" there was an *ex parte* order
4098 of the court in the words and figures following, to-wit:

"It is hereby ordered, that the plaintiff have ten days from the date hereof in which to deposit with the clerk of the court the sum of $1625, being the amount necessary to build 2.5 miles of fencing under the verdict of the jury in the above-entitled action, which is the number of miles consented by the plaintiff to be allowed in addition to the number of miles found necessary by the jury.

4099 "Dated Los Angeles, California, April 4th, 1919.

"PAUL J. MCCORMICK,
Judge."

To the making of said order and of the whole thereof, and also to the filing of the same in said main road case, the defendants in said case then and there duly excepted.

Exception No. 77.

4100 "That thereafter, and on the 18th day of March, 1919, plaintiff served and filed a notice of deposit in words and figures following, to-wit:

'Title of Court and Cause. No. B-59443.

'NOTICE OF DEPOSIT OF AMOUNT OF JUDGMENT WITH CLERK OF COURT.

'To the Defendant, Rindge Company, a Corpo-
4101 *ration, and to Its Attorneys, Messrs. Ander-*
son & Anderson and Nathan Newby, Esq.:

'You and each of you, will please take notice that on the 18th day of March, 1919, the County of Los Angeles, plaintiff herein, has deposited with H. J. Lelande, county clerk of the county of Los Angeles and *ex officio* clerk of the Superior Court of said county, the amount of the judgment in the above entitled action for said defendant as follows:

'For the defendant, Rindge Company, a corporation, the sum of $3,016.25, being the amount

4102 required to be paid to said defendant by the judgment in the above entitled action.

'Dated: Los Angeles, California, March 18, 1919.

A. J. HILL,
County Counsel;
CHARLES S. BURNELL,
Deputy County Counsel;
PAUL VALLEE,
Deputy County Counsel;
4103 *Attorneys for Plaintiff.'"*

"That thereafter and on the 5th day of April, 1919, the plaintiff served and filed stipulation and election to fence in words and figures following, to-wit:

'Title of Court and Cause.

STIPULATION AND ELECTION.

'Plaintiff, County of Los Angeles, hereby
4104 stipulates, agrees and consents to the allowance of 31.5 miles of 36 inch woven wire fence, with two barb wires above, and suitable posts, at the rate of $650 per mile, as necessary on the land and property of the defendant Rindge Company, a corporation, by reason of the taking and use for public highway purposes of the land sought to be taken from the defendant Rindge Company, and hereby stipulates and agrees to deposit with the clerk of the court for the defend-

ant Rindge Company, in addition to the amounts heretofore deposited, the sum of $1625.

'Plaintiff, County of Los Angeles, hereby stipulates, agrees and elects to build and construct 6.6 miles of 36 inch woven wire fence, with two barb wires above, and suitable posts, on the property of the defendant May K. Rindge, as specified in the verdict of the jury in the above entitled action, which are the fences for which damages have been assessed in said action in favor of defendant May K. Rindge; and

'Plaintiff, County of Los Angeles, hereby stipulates, agrees and elects to build and construct 31.5 miles of 36 inch woven wire fence, with two barb wires above, and suitable posts, on the property of the defendant Rindge Company, a corporation, as specified by the verdict of the jury and the order denying the motion for a new trial in the above entitled action, which are the fences for which damages have been assessed in said action, in favor of defendant Rindge Company.

Dated Los Angeles, California, April 4, 1919.

A. J. HILL,
County Counsel;
CHARLES S. BURNELL,
Deputy County Counsel;
PAUL VALLEE,
Deputy County Counsel;
Attorneys for Plaintiff.

'It is hereby ordered, that the plaintiff have ten days from the date hereby in which to deposit with the clerk of the court the sum of $1625, being the amount necessary to build 2.5 miles of fencing under the verdict of the jury in the above entitled action, which is the number of miles consented by the plaintiff to be allowed in addition to the number of miles found necessary by the jury.

Dated Los Angeles, California, April 4th, 1919.

PAUL J. MCCORMICK,
Judge.'"

That thereafter, to-wit: on the said 5th day of April, 1919, the court *and* caused to be entered an order in the said main road case in the words and figures following, to-wit:

"B-43,572.

April 5th, 1919.

"The County of Los Angeles etc. vs. The Rindge Company *et al.*

The plaintiff files notice of election to fence and stipulation of election.

It appearing to the court that the plaintiff in the above-entitled action has this day filed its consent in writing pursuant to an order of the court made April 3rd, 1919,

"The defendants' motion for a new trial herein is denied *in toto.*"

That said order was made *ex parte* and without any notice of any kind to either of the defendants in the said main road case or their attorneys; and to the making of said order and the whole thereof the defendants in said case then and there duly excepted.

Exception No. 78.

That thereafter, to-wit: on April 18th, 1919, the court made and filed in said main road case a "Final Order of Condemnation," which said last-mentioned order was thereafter, on April 29th, 1919, duly docketed and entered by the clerk of this court, and which said order was and is in the words and figures following, to-wit (omitting the descriptions of the property ordered condemned, which are the same in every respect as the descriptions of the property sought to be condemned contained in the complaint in the main road case):

(Title of Court and Cause.)

"No. B-43572.

FINAL ORDER OF CONDEMNATION.

"It appearing to the satisfaction of the court that the plaintiff in the above-entitled action has deposited with H. J. Lelande, county clerk of Los Angeles county and *ex-officio* clerk of the Superior Court of said county, for the defendants herein, as required by that certain inter-

4114 locutory judgment of condemnation made and filed in the above-entitled cause on the 5th day of February, 1919, and recorded in book 431 of judgments, page 152, records of the clerk of the above-entitled court, as follows:

"The sum of $30,515.37 and costs in the sum of $2,381.38 for the defendant, Rindge Company, a corporation;

"The sum of $7,498.62 for the defendant, May K. Rindge; and

4115 "The sum of $66.75 for the defendant, Hueneme, Malibu & Southern Railway Company, a corporation; and

"The court having, on the 3rd day of April, 1919, made and filed with the clerk of the court an order in words following, to-wit:

" 'Defendants' motion for a new trial herein is denied except as to the issue of suitable fences, which issue was under a stipulation and

4116 concession submitted to the jury herein. Under this concession it was the duty of the jury to have found that no less than 31.5 miles of fencing was necessary on the land and property of defendant Rindge Company, a corporation, and inasmuch as the jury failed to so find, a new trial on the issue of necessary suitable fences will be ordered unless within two (2) days from this date the plaintiffs herein file with the clerk of this court consent in writing to the allowance of 31-5/10 miles of fencing at the rate and of

4117 the kind found by the jury herein. If such written consent is filed as aforesaid, the motion of defendant for a new trial is denied *in toto*.

Apr. 3, 1919.

(Signed) PAUL J. MCCORMICK, *J.*'

And

"It further appearing to the satisfaction of the court that on the 5th day of April, 1919, the plaintiff, County of Los Angeles, filed a
4118 stipulation and election with the clerk of the court in words following, to-wit:

" 'Plaintiff, County of Los Angeles, hereby stipulates, agrees and consents to the allowance of 31.5 miles of 36 inch woven wire fence, with two barb wires above, and suitable posts, at the rate of $650 per mile, as necessary on the land and property of the defendant Rindge Company, a corporation, by reason of the taking and use for public highway purposes of the land
4119 sought to be taken from the defendant Rindge Company, and hereby stipulates and agrees to deposit with the clerk of the court for the defendant Rindge Company, in addition to the amounts heretofore deposited, the sum of $1625.

" 'Plaintiff, County of Los Angeles, hereby stipulates, agrees and elects to build and construct 6.6 miles of 36 inch woven wire fence, with two barb wires above, and suitable posts, on the property of the defendant, May K. Rindge, as specified in the verdict of the jury

in the above-entitled action, which are the fences for which damages have been assessed in said action, in favor of defendant, May K. Rindge; and

" 'Plaintiff, County of Los Angeles, hereby stipulates, agrees and elects to build and construct 31.5 miles of 36 inch woven wire fence, with two barb wires above, and suitable posts, on the property of the defendant, Rindge Company, a corporation, as specified by the verdict of the jury and the order denying the motion for a new trial in the above-entitled action, which are the fences for which damages have been assessed in said action, in favor of defendant, Rindge Company.

"Dated Los Angeles, California, Apr. 4, 1919.

A. J. HILL,
County Counsel;
C. S. BURNELL,
Deputy County Counsel;
PAUL VALLEE,
Deputy County Counsel;
Attorneys for Plaintiff.

" 'It is hereby ordered, that the plaintiff have ten days from the date hereof in which to deposit with the clerk of the court the sum of $1625, being the amount necessary to build 2.5 miles of fencing under the verdict of the jury in the above-entitled action, which is the number

4123 of miles consented by the plaintiff to be allowed in addition to the number of miles found necessary by the jury.

"'Dated Los Angeles, California, Apr. 4, 1919.

PAUL J. MCCORMICK,
Judge.'

"And it further appearing to the court that on the 14th day of April, 1919, plaintiff County
4124 of Los Angeles, in compliance with said order made and filed on the 3rd day of April, 1919, and in compliance with said stipulation and election filed on the 5th day of April, 1919, did deposit with H. J. Lelande, county clerk of Los Angeles county and *ex-officio* clerk of the Superior Court of said county, for the defendant, Rindge Company, the further sum of $1625;

"Now, therefore, on motion of A. J. Hill, county counsel; Charles S. Burnell, deputy
4125 county counsel, and Paul Vallee, deputy county counsel, attorneys for plaintiff, it is ordered, adjudged and decreed that the parcels of land hereinafter described be, and the same are hereby condemned for public highway purposes.

"Said properties so condemned for public highway purposes are more particularly described as follows:

"Land of defendant, May K. Rindge: (Description.) * * *

4126 "Land of defendant, Rindge Company, a corporation: (Description.) * * *

"Lands of defendant, Hueneme, Malibu and Southern Railway, a corporation: (Description.) * * *

"Done in open court this 18th day of April, 1919.

PAUL J. McCORMICK,
Judge of the Superior Court."

4127 That said "Final Order of Condemnation" in said main road case was made *ex parte*, and without any notice to either of the defendants in said case or to either or any of their attorneys; and to the said order and to the whole thereof and to each and every part thereof the defendants then and there excepted.

Exception No. 79.

"That thereafter, and on the 25th day of April, 1919, the plaintiff served and filed a
4128 notice of final order of condemnation in words and figures following, to-wit:

'(Title of Court and Cause.)'

'NOTICE OF FINAL ORDER OF CONDEMNATION.

'To the Defendant Rindge Company, a Corporation, May K. Rindge and Hueneme, Malibu & Southern Railway Company, a Corporation, and to Messrs. Anderson & Anderson and Nathan Newby, Their Attorneys:

'You and each of you will please take notice that the final order of condemnation in the

4129 above entitled action was signed by the court and filed with the clerk of the court on the 18th day of April, 1919.

'Dated Los Angeles, California, April 25th, 1919.

A. J. HILL,
County Counsel;
CHARLES S. BURNELL,
Deputy County Counsel,
Attorneys for Plaintiff.'"

4130 That in the Alisos Canyon road case, No. B-59,443, the court, on January 30th, 1919, made and filed its findings of fact and conclusions of law in favor of the plaintiff and against the defendant, and ordered that judgment be entered accordingly, which findings of fact and conclusions of law are a part of the judgment roll in said case.

4131 That thereafter, to-wit: on February 5th, 1919, the court made and filed its so-called "Interlocutory Judgment of Condemnation" in said last-mentioned case, which was thereafter on February 11th, 1919, duly docketed and entered by the clerk of this court, and is a part of the judgment roll in said Alisos Canyon case.

"That thereafter, and on the 25th day of April, 1919, the plaintiff served and filed a notice of final order of condemnation in said Los Alisos Canyon case, which said notice of

4132 final order of condemnation was (except as to the title and the number of said case) in the exact words and figures as the notice of final order of condemnation filed in the main road case, and hereinabove set forth."

That thereafter and within the time allowed by law the defendant in said Alisos Canyon case served and filed its notice of intention to move for a new trial thereof, which said notice of
4133 intention was (except as to the title and the number of said case) in the exact words and figures and of the same date as the "Notice of Intention to Move for a New Trial" filed in the main road case and hereinabove set forth.

That thereafter, and within the time allowed by law, the defendant in said Alisos Canyon case, pursuant to its said notice of intention so to do, moved the court as therein stated, and upon each and all and every of the grounds
4134 therein stated; and thereafter, on April 3rd, 1919, the court in said Alisos Canyon road case made and caused to be entered the following order in the matter of said motion for a new trial, to-wit:

4135 "No. B-59,443.

"County of Los Angeles etc. vs. The Rindge Co. *et al.*

"The motion for a new trial heretofore heard and submitted.

"Defendant's motion for a new trial is denied."

To the making of the said order and to the said order and the whole thereof, the defendant
4136 in said Alisos Canyon case then and there duly excepted.

Exception No. 80.

"That thereafter, and on the 6th day of February, 1919, the plaintiff served and filed a notice of decision in the Los Alisos Canyon road case, which notice of decision was (except as to the title of and the number of said case) in the exact words and figures as the notice of
4137 decision filed in the main road case, and hereinabove set forth.

"That thereafter, and on the 4th day of April, 1919, the plaintiff served and filed a notice of election to fence in said Los Alisos Canyon case, which said notice of election to fence was (except as to the title and the number of said case) in the exact words and figures as the notice of election to fence filed in the main road case, and hereinabove set forth.'

That thereafter, to-wit, on April 18th, 1919, the court in said Alisos Canyon road case made a "Final Order of Condemnation" therein, which was thereafter duly docketed and entered by the clerk of this court, and which was and is in the words and figures following (omitting therefrom the descriptions of the property therein ordered condemned, such descriptions being the same in every particular as the descriptions in the complaint in said Alisos Canyon suit of the property sought to be condemned):

"(Title of Court and Cause.)

No. B-59443.

FINAL ORDER OF CONDEMNATION.

It appearing to the satisfaction of the court that the plaintiff in the above-entitled action has deposited with H. J. Lelande, county clerk of Los Angeles county and *ex-officio* clerk of the Superior Court of said county, for the defendant herein, as required by that certain interlocutory judgment of condemnation made and filed in the above-entitled cause on the 5th day of February, 1919, and recorded in book 431 of judgments, page 266, records of the clerk of the above-entitled court, as follows:

The sum of $3,016.25 for the defendant, Rindge Company, a corporation; and

It further appearing to the court that plaintiff, County of Los Angeles, on the 5th day of

April, 1919, filed with the clerk of the court 'Notice of Election to Fence' in words following, to-wit:

'To the Defendant, Rindge Company, a Corporation, and to Its Attorneys, Anderson & Anderson and Nathan Newby:

You and each of you will please take notice that the plaintiff, County of Los Angeles, hereby elects to build and construct 3.87 miles of 36 inch woven wire fence, with two barb wires above, with suitable posts, as specified by the verdict of the jury in the above-entitled action, which are the fences for which damages have been assessed in said action.

Dated Los Angeles, California, April 4th, 1919.

A. J. HILL,
County Counsel;
C. S. BURNELL,
Deputy County Counsel;
PAUL VALLEE,
Deputy County Counsel,
Attorneys for Plaintiff.'

Now, therefore, on motion of A. J. Hill, county counsel; Charles S. Burnell, deputy county counsel, and Paul Vallee, deputy county counsel, attorneys for plaintiff,

It is ordered, adjudged and decreed that the parcels of land hereinafter described be, and

4144 the same are hereby condemned for public highway purposes.

Said parcels of land so condemned for public highway purposes are more particularly described as follows:

"A strip of land 40 feet wide, being a portion of the Rancho Topanga Malibu Sequit, as shown on map recorded in book 1, page 414 *et seq.* of patents, records of Los Angeles county, said
4145 strip being bounded southerly by the northerly line of parcel No. 117, in division No. 7, of Malibu road, as shown on county surveyor's map No. 807(), on file in the office of the surveyor of Los Angeles county, and bounded northerly by the northerly line of said Rancho Topanga Malibu Sequit, said strip lying 20 feet on each side of the following described center line

(Description.)

Done in open court this 18th day of April,
4146 1919.

PAUL J. MCCORMICK,
Judge of the Superior Court."

That the said "Final Order of Condemnation" in the said Alisos Canyon road case was made *ex parte,* and without any notice whatever to the defendant in said case or to any of its attorneys; and to the said order and to the whole thereof, and to each and every part thereof the defendant in said case then and there excepted.

Exception No. 81.

4147 "That on the 21st day of April, 1919, the plaintiff served and filed a notice of motion for order authorizing plaintiff to take possession of property, which notice of motion was and is in the words and figures following, to-wit:

'(Title of Court and Cause.)

'NOTICE OF MOTION FOR ORDER AUTHORIZING PLAINTIFF TO TAKE POSSESSION OF PROPERTY.

4148 *'To the Defendant, Rindge Company, a Corporation, May K. Rindge and the Hueneme, Malibu & Southern Railway Company, a Corporation, and to Their Attorneys, Messrs. Anderson & Anderson and Nathan Newby:*

'You and each of you will please take notice that the plaintiff herein by its attorneys, A. J. Hill, county counsel, and Charles S. Burnell and
4149 Paul Vallee, deputies county counsel, will be and appear before the above entitled court, in Department 15 thereof, at the court room of said department in the county court house, county of Los Angeles, on Tuesday, the 6th day of May, 1919, at the hour of 10 o'clock in the forenoon of said day, and then and there, or as soon thereafter as counsel may be heard, will move the court for an order authorizing the plaintiff to take possession of and use the property described in the interlocutory judgment of con-

demnation in the above-entitled action during the pendency of and until the final conclusion of the litigation herein.

'Dated Los Angeles, California, April 21st, 1919.

A. J. HILL,
County Counsel;
CHARLES S. BURNELL,
Deputy County Counsel;
PAUL VALLEE,
Deputy County Counsel,
Attorneys for Plaintiff.'"

"That thereafter, on the 23rd day of May, 1919, the said motion for possession of said property, pursuant to said notice of motion last hereinabove set forth, came on regularly for hearing before said judge, and thereafter, on the 11th day of July, 1919, the said court made and rendered and filed its decision on said motion, which said decision is in words following, to-wit:

'(Title of Court and Cause.)

'The county of Los Angeles commenced proceedings against May K. Rindge, Rindge Company, a corporation, *et al.*, to condemn a strip and certain parcels of land through and across a portion of the Malibu Ranch in Los Angeles county, for highway purposes.

'Trial was had, judgment passed for the plaintiff, the damages for the value of the land to be taken and for the injury which would result to the remaining lands of defendants being assessed by a jury.

'Defendants regularly made a motion for a new trial, which was denied, and defendants have perfected their appeal to the Supreme Court from the decree of condemnation herein, which appeal is still pending.

'Plaintiff has deposited in this court the amount required to be paid the defendants, respectively, by the judgment herein and given notice that it would move for an order authorizing it to take possession, and use of the land described in the decree of condemnation herein as provided for in Sec. 1254 of the Code of Civil Procedure.

'The motion was regularly made and was thereafter submitted to the court for decision on briefs filed by counsel.

'The principal ground of opposition to the motion, indeed the only objection that has any merit, is that this court is without jurisdiction to grant the motion and make an order for possession herein because the proceedings in the court, wherein the judgment of condemnation and award of damage was made, were unauthorized by law, and therefore, without jurisdiction, it being their contention that the viewer method,

provided for in Sec. 2681 *et seq.*, Political Code, is the sole, exclusive and compulsory method and procedure for acquisition of rights of way by counties for public highway purposes.

'This contention has been passed on by both the District Court of Appeal of the Second District of California and by the Supreme Court of California in this case, and each of said courts has decided that this court had, and has, jurisdiction herein. (Rindge Company against the Superior Court etc., 28 Cal. App. Dec. and 57 Cal. Dec. 464.)

'Such being the case plaintiff has an unquestionable right, under Heilborn against Superior Court etc., 151 Cal. 271, to the possession of, and use of the land condemned, solely for the purpose of constructing the public highway over and across the same in the manner and according to the method as decreed in the final order of condemnation herein, and not otherwise.

'It is therefore ordered that said motion be granted as aforesaid upon the deposit by the plaintiff of the further sum of $7500.00 in the state treasury of California, to be held by the state treasurer as a fund to pay any further damages as may be sustained by defendants, if for any cause the property shall not finally be taken for public use as such public highway.

'The possession and use of said property is to be restricted and limited entirely to the lands

condemned for the sole and exclusive purpose of constructing said public highway as aforesaid, and said land or right of way is not to be used or traveled by the public until the same shall have been constructed and built as shown by the evidence in this proceeding, and as provided in the final order of condemnation herein.

'Counsel will present an order in accordance herewith and also evidence of the required deposit.'"

PAUL J. McCORMICK.

"'Dated this 11th day of July, 1919.'"

"And that thereafter and on the said 11th day of July, 1919, the said court, acting by and through the said judge in this suit, made and caused to be entered upon the minutes of said court the following order, to-wit:

(Title of Court and Cause.)

'No. B-43572.

Friday, July 11th, 1919.

'Present: Hon. Paul J. McCormick, judge.

'The motion for order authorizing the plaintiff to take possession of and use the property described heretofore heard and submitted.

'The decision of the court on motion for possession filed.

'The motion for possession herein will be granted in accordance with written decision thereon heretofore filed.

PAUL J. McCORMICK, J.'"

4162 "That thereafter and prior to the 28th day of July, 1919, the said County of Los Angeles, plaintiff in this suit, in pursuance to said order of July 23rd, 1919, deposited with the state treasury of the state of California the said further sum of $7500 as by said order directed to be deposited and for the purposes specified in said order.

"That thereafter the said court, acting by and
4163 through the said judge, and at the instance of the plaintiff in this suit, to-wit: on July 28, 1919, made and caused to be entered in said suit an order in the words and figures following, to-wit:

'(Title of Court and Cause.)

No. B-43572.

'ORDER AUTHORIZING PLAINTIFF TO TAKE IMMEDIATE POSSESSION AND USE OF PROP-
4164 ERTY.

" 'Whereas, the plaintiff herein filed its verified complaint in an action in eminent domain wherein said plaintiff sought to acquire a right of way for public use, to-wit: for public highway purposes; and

'Whereas, a trial has been had and judgment has passed for plaintiff, the damages for the value of the land to be taken and the damages caused to the lands of the defendants by reason

of the severance of such lands from the portion sought to be taken, having been assessed by a jury; and

'Whereas, an interlocutory judgment in condemnation was duly signed by the court and filed with the clerk of the court; and

'Whereas, the plaintiff has deposited in court the amount required to be paid to the defendants respectively by the judgment herein; and

'Whereas, a final order of condemnation duly signed by the court has been filed with the clerk of the court; and

'Whereas, the defendants regularly moved the court for a new trial, which was denied, and the defendants have perfected an appeal to the Supreme Court from the decree of condemnation herein, which appeal is still pending; and

'Whereas, plaintiff gave notice as required by law that it would move the court for an order authorizing it to take possession and use of the property described in the decree of condemnation herein; and

'Whereas, said motion regularly came on for hearing and was thereafter submitted to the court for a decision on briefs filed by counsel; and

'Whereas, the defendants objected to the hearing or granting of said motion of said court on the ground that said court was without jurisdiction to grant the motion and make the order

authorizing plaintiff to take possession of and use the property herein because said proceedings were unauthorized by law; and

'Whereas, the defendants petitioned the District Court of Appeal of the Second Appellate District of the state of California for a writ of prohibition to restrain and prohibit this court from proceeding to hear said motion on the ground that this court was without jurisdiction, which petition for a writ of prohibition was denied; and

'Whereas, the defendants petitioned the Supreme Court of the state of California for a writ of prohibition for the same reasons and on the same ground that the petition was made to the District Court of Appeal, which petition was denied; and

'Whereas, each of said courts has decided that this court had and has jurisdiction herein; and

'Whereas, this court has decided that said motion shall be granted upon the deposit by the plaintiff of the further sum of seventy-five hundred dollars ($7500) in the state treasury of the state of California to be held by the state treasurer as a fund to pay any further damages that may be sustained by the defendants if for any cause the property shall not be finally taken for public use as a public highway; and

'Whereas, said plaintiff, County of Los Angeles has deposited said further sum of seventy-

4171 five hundred dollars ($7500) in the state treasury of the state of California;

'Now, therefore, it is hereby ordered, adjudged and decreed that the plaintiff, county of Los Angeles, may take immediate possession and use of the right of way described in the final order of condemnation herein solely for the purpose of constructing a public highway over and across said right of way, in the manner and according to the method decreed in the final
4172 order of condemnation herein and not otherwise, during the pendency of and until the final conclusion of the litigation herein.

'And it is further ordered, adjudged and decreed that said right of way shall not be used or traveled by the public until a highway shall have been constructed and built thereon, as shown by the evidence in this proceeding and as provided in the final order of condemnation herein;

4173 'And it is further ordered, adjudged and decreed that all actions and proceedings against the plaintiff County of Los Angeles on account of this order authorizing it to take possession and use of said property be stayed during the pendency of and until the final conclusion of the litigation.

Done in open court this 28th day of July, 1919.

PAUL J. MCCORMICK,
Judge of Superior Court.'"

4174 SPECIFICATIONS OF PARTICULARS IN WHICH THE EVIDENCE IN THE MAIN ROAD CASE IS INSUFFICIENT TO JUSTIFY THE VERDICT OF THE JURY IN THAT CASE.

The evidence in the Main Road Case No. B-43572 is insufficient to justify the verdict of the jury in that case in the following particulars which are hereby specified by the defendants:

First—It is insufficient to justify the verdict
4175 of the jury that the amount of the severance damage to the remaining portion of defendant, May K. Rindge's, land not sought to be taken by reason of the severance therefrom of the part which is sought to be taken was $1162.36; and particularly in this that the evidence in said case showed that such severance damage would be approximately $30,000.00;

Second—It is insufficient to justify the verdict of the jury that it will be necessary to con-
4176 struct only 6.6 miles of fencing on the property of defendant, May K. Rindge, by reason of the taking and use for public highway purposes of the land sought to be taken by the defendant, May K. Rindge, and particularly in this that the evidence shows that the number of miles of fencing for said purpose was 9.14 miles;

Third—The evidence is insufficient to justify the verdict of the said jury that the kind of

4177 fencing that will be suitable to be constructed on the land of defendant, May K. Rindge, by reason of such taking and use of her land sought to be taken is 36 inch woven wire with two barbed wires above with suitable posts;

Fourth—The evidence is insufficient to justify the verdict of the jury that the cost of such fencing on the land of the defendant, May K. Rindge, will be $550.00 per mile, or total of $3630.00;

4178 Fifth—The evidence is insufficient to justify the verdict of the jury that the damage to the portion of the defendant, Rindge Company's, land not sought to be taken by reason of the severance therefrom of the part which is sought to be taken will be $3696.00, and particularly in this that the evidence shows that the said damage from said severance to the said Rindge Company's lands would be approximately the sum of $60,000.00;

4179 Sixth—The evidence is insufficient to justify the verdict of the jury that it will be necessary to construct on the property of the defendant, Rindge Company, by reason of the taking and use for public highway purposes of the land sought to be taken from the said defendant will be 29 miles only; and particularly in this that the evidence shows that the number of miles of fencing for said purpose which will be necessary is 33.22 miles;

4180 Seventh—The evidence is insufficient to justify the verdict of the jury that the kind of fencing that will be suitable to be constructed on the land of defendant, Rindge Company, by reason of such taking and use of its land sought to be taken is 36 inch woven wire with two barbed wires above with suitable posts;

Eighth—The evidence is insufficient to justify the verdict of the jury that the cost of such fencing on the land of defendant, Rindge Com-
4181 pany, will be $650.00 per mile—$18,859.

SPECIFICATIONS OF PARTICULARS IN WHICH THE EVIDENCE IN THE MAIN ROAD CASE IS INSUFFICIENT TO JUSTIFY THE DECISION OF THE COURT IN THAT CASE.

The defendants now specify the following particulars in which the evidence in the main road case is insufficient to justify the decision
4182 of the court in that case:

First—The evidence is insufficient to justify the decision that it is necessary for highway purposes to acquire an easement in and over the properties particularly described in paragraph II of the complaint for the construction, establishment and maintenance of a public highway as prayed in said complaint;

Second—The evidence is insufficient to justify the decision that the public interest requires the

4183 acquisition of an easement in and over the said properties for the said purpose;

Third—The evidence is insufficient to justify the decision that the public convenience requires the acquisition of such an easement for such purpose;

Fourth—The evidence is insufficient to justify the decision that the public necessity requires the acquisition of such an easement for such purpose;

4184

Fifth—The evidence is insufficient to justify the decision that the use to which the property sought to be taken is to be applied is a use authorized by law;

Sixth—The evidence is insufficient to justify the decision that it is necessary to acquire said easement over the said lands;

Seventh—The evidence is insufficient to justify the decision that the defendant, Hueneme,

4185 Malibu & Port Los Angeles Railway, a corporation, did not within two years after filing its original articles of incorporation, or at any other time, begin the construction of its road or any portion thereof;

Eighth—The evidence is insufficient to justify the decision that the defendant, Hueneme, Malibu & Southern Ry., a corporation, did not within one year after beginning the construction of its road, or ever, put in full or in any opera-

4186 tion at least five miles or any other portion of its road;

Ninth—The evidence is insufficient to justify the said decision wherein it is found and decided as follows: "nor have said corporations, or either of them, ever operated any railroad or railroads by the running thereover of any passenger, mixed or other trains for the carriage of the public or baggage or freight, or for any other public purpose whatsoever;

4187 Tenth—The evidence is insufficient to justify the decision that the public use to which said property is to be applied is a more necessary public use than that to which it has already or heretofore been appropriated;

Eleventh—The evidence is insufficient to justify the decision that the proposed public improvement is located by the taking of said lands in the manner which will be the most com-

4188 patible with the greatest public good and the least private injury;

Twelfth—The evidence is insufficient to justify the decision that the proposed public improvement is located by the taking of said lands in the manner which will be the most compatible with the greatest public good;

Thirteenth—The evidence is insufficient to justify the decision that the proposed public improvement is located by the taking of said

4189 lands in the manner which will be the most compatible with the least private injury;

Fourteenth—The evidence is insufficient to justify the decision that it is not true that there has been no consideration or determination of the board of supervisors of the county of Los Angeles of any of the matters or things alleged in said complaint and particularly of the matters or things alleged in paragraph II of said complaint;

4190 Fifteenth—The evidence is insufficient to justify the decision in either or any of the following particulars:

(a) "Nor is it true that the resolution referred to in paragraph II of said complaint was arbitrarily adopted by said board of supervisors without any consideration of the matters or things therein contained, or without the exercise of any discretion therein, or well knowing that

4191 there was no room for the exercise of any discretion therein, or that it was arbitrarily adopted, at all;"

(b) "Nor is it true that said resolution was adopted by said board of supervisors knowing full well or otherwise or at all that any of the property proposed to be taken for a public road or highway and to be condemned as in said resolution set forth and as in the complaint alleged was not and could not be necessary for any public use of any kind or character whatever."

4192 (c) "And cannot under any circumstances afford any accommodation of any kind or character to the traveling public, or any part or portion thereof."

Sixteenth—The evidence is insufficient to justify the decision that it is not true that said resolution was adopted by said board of supervisors knowing full well that the taking of the property proposed for said highway purposes would be without due process of law or in
4193 violation of the provisions of the Fourteenth Amendment to the Constitution of the United States;

Seventeenth—The evidence is insufficient to justify the decision that it is not true that said resolution was adopted by said board of supervisors knowing full well that the taking of said property under said resolution for public highway or other purposes would be void;

4194 Eighteenth—The evidence is insufficient to justify the decision that it is not true that said resolution was adopted by said board of supervisors knowing full well that the taking of said property under said resolution would be a denial to the defendants, or any or either of them, of the equal protection of the laws under the Constitution of the United States;

Nineteenth—The evidence is insufficient to justify the decision that it is not true that said resolution was adopted by said board of super-

4195 visors knowing full well that the taking of said property under said resolution would contravene the fourteenth or any amendment to the Constitution of the United States;

Twentieth—The evidence is insufficient to justify the decision "that the highway sought to be established and maintained over and upon the land sought to be taken and for the purpose of which the taking is sought, will afford accommodation to the traveling public;"

4196 Twenty-first—The evidence is insufficient to justify the decision found in paragraph I of the "conclusions of law;"

Twenty-second—The evidence is insufficient to justify the decision found in paragraph II of the "conclusions of law;"

Twenty-third—The evidence is insufficient to justify the decision found in paragraph III of the "conclusions of law;"

4197 Twenty-fourth—The evidence is insufficient to justify the decision found in paragraph IV of the "conclusions of law."

Twenty-fifth: The evidence is insufficient to justify the decision in said case that any highway whatever was or is sought to be established or maintained over any part of the land or lands sought to be taken in said case.

4198 SPECIFICATIONS OF PARTICULARS IN WHICH THE DECISION IN THE MAIN ROAD CASE IS AGAINST LAW.

The defendants now specify the following particulars in which the decision in the Main Road Case is against law.

First: Said decision is against law in this that the resolution of the board of supervisors set forth in the amended complaint was passed
4199 and adopted by the board of supervisors of the county of Los Angeles without any jurisdiction or authority so to do and was and is void.

Second: Said decision is against law in this, that the amended complaint herein upon which said decision was based fails to state facts sufficient to constitute a cause of action against these or either or any of these defendants, and that all proceedings taken thereunder are void.

Third: Said decision is against law in this,
4200 that the Superior Court of the county of Los Angeles, state of California, in which said decision in said action was made and given was and is without any jurisdiction whatever of the subject matter of said action and each and all and every of its acts therein were and are without jurisdiction and were and are void.

Fourth: Said decision is against law when and wherein it finds as a conclusion of law that it is necessary for highway purposes to acquire

an easement over the property described in paragraph II of the amended complaint in said action.

Fifth: Said decision is against law when and wherein it finds as a conclusion of law that the public interest, convenience and necessity or either require the acquisition of an easement over the property described in paragraph II of the amended complaint in said action for the construction, establishment and maintenance or either of a public highway.

Sixth: Said decision is against law when and wherein it finds and decides as found and decided in paragraph IV of the conclusions of law in said action.

Seventh: Said decision is against law when and wherein it finds and decides as is found and decided in paragraph II of the conclusions of law in said action.

Eighth: Said decision is against law when and wherein it finds and decides as is found and decided in paragraph III of the conclusions of law in said action.

Ninth: Said decision is against law when and where it finds and decides that it is necessary to take any part or portion of any property whatever of the defendants or of either or any of them for any highway purposes or for any purpose or purposes whatever.

Tenth: Said decision is against law when and wherein it finds and decides that the taking of said property by the plaintiff would not be a denial to the defendants of the equal protection of the laws under the Constitution of the United States;

Eleventh: That said decision is against law in this that it constitutes and is a denial to the defendants of the equal protection of the laws under the Constitution of the United States.

Twelfth: That said decision is against law in this that it contravenes the Fourteenth Amendment to the Constitution of the United States.

Thirteenth: That said decision is against law when and wherein it finds and decides that the taking of said property by the plaintiff does not contravene the Fourteenth Amendment to the Constitution of the United States.

SPECIFICATIONS OF PARTICULARS IN WHICH THE EVIDENCE IN THE ALISOS CANYON ROAD CASE IS INSUFFICIENT TO JUSTIFY THE VERDICT OF THE JURY IN THAT CASE.

First: It is insufficient to justify the verdict: "Will the remaining portion of defendant Rindge Company's land, not sought to be taken, be damaged by reason of the severance therefrom of the part which is sought to be taken? "Answer No."

4207 Second: It is insufficient to justify the verdict:

"If your answer to the last interrogatory was in the affirmative, what do you find the amount of such severance damage to be?

"Answer None."

Third: The evidence is insufficient to justify the verdict of the said jury in said case that the kind of fencing that will be suitable to be constructed on the land of the defendant, Rindge
4208 Company, by reason of such taking and use of its land sought to be taken is 36 inch woven wire with two barbed wires above with suitable posts.

Fourth: The evidence is insufficient to justify the verdict of said jury in said case that the cost of such fencing on the land of the defendant, Rindge Company, will be $675.00 per mile—total of $2612.25.

4209 SPECIFICATIONS OF PARTICULARS IN WHICH THE EVIDENCE IN THE ALISOS CANYON ROAD CASE IS INSUFFICIENT TO JUSTIFY THE DECISION OF THE COURT IN THAT CASE.

The defendant, Rindge Company, having thus specified the particulars in which the evidence in the Alisos Canyon Road Case is insufficient to justify the verdict of the jury in that case, now specifies the following particulars in which the evidence in the said Alisos Canyon Road Case

4210 is insufficient to justify the decision of the court in that case:

First: The evidence is insufficient to justify the decision in said case that the public interest and necessity require the construction of a public highway over the property described in paragraph II of the complaint.

Second: The evidence is insufficient to justify the decision in said case that "for the purpose of constructing a public highway, the
4211 acquisition of said property is necessary," viz.: the property described in paragraph II of the complaint.

Third: The evidence is insufficient to justify the decision in said case that "said public improvement is planned in the manner which will be most compatible with the greatest public good and the least private injury."

Fourth: The evidence is insufficient to justify
4212 the decision in said case that it is not true that there has been no consideration or determination of the board of supervisors of the county of Los Angeles of any of the matters or things alleged in the complaint in said case and particularly of the matters or things alleged in paragraph IV of said complaint.

Fifth: The evidence is insufficient to justify the decision in said case in either or any of the following particulars:

4213 (A) "Nor is it true that the resolution referred to in paragraph IV of the complaint was arbitrariiy adopted by said board of supervisors without any consideration of the matters or things therein contained, or without the exercise of any discretion therein, or well knowing that there was no room for the exercise of any discretion therein, or that it was arbitrarily adopted at all;"

(B) "Nor is it true that said resolution was
4214 adopted by said board of supervisors knowing full well or otherwise or at all that any of the property proposed to be taken for a public road or highway and to be condemned as in said resolution set forth and as in the complaint alleged was not and could not be necessary for any public use of any kind or character whatever,";

(C) "And cannot under any circumstances afford any accommodation of any kind or character to the traveling public."

4215 Sixth: The evidence is insufficient to justify the decision in said case that it is not true that said resolution was adopted by said board of supervisors knowing full well that the taking of the property proposed for said highway purposes would be without due process of law or in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

4216 Seventh: The evidence is insufficient to justify the decision in said case that it is not true that said resolution was adopted by the said board of supervisors knowing full well that the taking of said property under said resolution for public highway or other purposes would be void.

Eighth: The evidence is insufficient to justify the decision in said case that it is not true that said resolution was adopted by said board of
4217 supervisors knowing full well that the taking of said property under said resolution would be a denial to the defendant in said action of the equal protection of the laws under the Constitution of the United States.

Ninth: The evidence is insufficient to justify the decision in said case that it is not true that said resolution was adopted by said board of supervisors knowing full well that the taking of said property under said resolution would con-
4218 travene the fourteenth or any amendment to the Constitution of the United States.

Tenth: The evidence is insufficient to justify the decision in said case, "that the highway sought to be established and maintained over and upon the land sought to be taken and for the purpose of which the taking is sought will afford accommodation to the traveling public."

Eleventh: The evidence is insufficient to justify the decision in said case found in paragraph I of the conclusions of law in said case.

4219 Twelfth: The evidence is insufficient to justify the decision in said case found in paragraph II of the conclusions of law in said case.

Thirteenth: The evidence is insufficient to justify the decision in said case found in paragraph III of the conclusions of law in said case.

Fourteenth: The evidence is insufficient to justify the decision in said case that any highway whatever was or is sought to be established or maintained over or upon any part of the land
4220 sought to be taken in said case.

SPECIFICATIONS OF PARTICULARS IN WHICH THE DECISION IN THE ALISOS CANYON ROAD CASE IS AGAINST LAW.

The defendant Rindge Company now specifies the following particulars in which the decision in the Alisos Canyon Road Case is against law:

4221 First: Said decision is against law in this that the resolution of the board of supervisors pleaded and referred to in the complaint in said case was passed and adopted by the board of supervisors of the county of Los Angeles without any jurisdiction or authority so to do and was and is void.

Second: Said decision is against law in this, that the complaint in said case upon which said decision was based fails to state facts sufficient to constitute a cause of action against the de-

4222 fendant Rindge Company or for the taking of any private property for highway or other purposes.

Third: Said decision is against law in this, that the Superior Court of the county of Los Angeles, state of California, in and by which said decision in said action was made and given was and is without any jurisdiction whatever of the subject matter of said action, and each and all and every of its acts therein were and are
4223 without jurisdiction and were and are void.

Fourth: Said decision is without law when and wherein it finds as a conclusion of law that it is necessary for highway purposes to acquire an easement over any of the property described in paragraph II of the complaint in said action.

Fifth: Said decision is against law when and wherein it finds as a conclusion of law that the public interest, convenience or necessity or either
4224 require the acquisition of an easement over the property described in paragraph II of the complaint in said action for the construction, establishment and maintenance or either of a public highway:

Sixth: Said decision is against law when and wherein it finds and decides as is found and decided in paragraph II of the conclusions of law in said action.

Seventh: Said decision is against law when and wherein it finds and decides as is found and

decided in paragraph III of the conclusions of law in said action.

Eighth: Said decision is against law when and wherein it finds and decides that it is necessary to take any part or portion of any property whatever of the defendant Rindge Company for any highway purposes or for any purpose or purposes whatever.

Ninth: Said decision is against law when and wherein it finds and decides that the taking of said property by the plaintiff would not be a denial to the defendant Rindge Company of the equal protection of the laws under the Constitution of the United States.

Tenth: Said decision is against law in this that it constitutes and is a denial to the defendant Rindge Company of the equal protection of the laws under the Constitution of the United States.

Eleventh: That said decision is against law in this that it contravenes the Fourteenth Amendment to the Constitution of the United States.

Twelfth: Said decision is against law when and wherein it finds and decides that the taking of said property by the plaintiff does not contravene the Fourteenth Amendment to the Constitution of the United States.

The foregoing proposed bill of exceptions is hereby respectfully submitted this .... day of October, 1919.

ANDERSON & ANDERSON and
NATHAN NEWBY,
Attorneys for the Defendants.

Received copy of within this 24th day of Oct., 1919.

A. J. HILL,
County Counsel;
By PAUL VALLEE,
Deputy.

The foregoing bill of exceptions in the above-entitled actions is hereby settled and allowed as full, true and correct, this 29th day of March, 1920.

PAUL J. McCORMICK,
Judge.

Endorsed: Filed Mar. 29, 1920. L. E. Lampton, county clerk; by E. C. Polsue, deputy.

4231 **Clerk's Certificate.**

STATE OF CALIFORNIA, }
COUNTY OF LOS ANGELES, } ss.

I, L. E. Lampton, county clerk and *ex-officio* clerk of the Superior Court in and for said county, hereby certify that I have compared the foregoing transcript with the original papers in the above entitled action now on file in my office, and that the same contains full, true and correct
4232 copies of the judgment roll and the notice of appeal in case No. B 43572 and in case No. B 59443; stipulation as to various descriptions and the engrossed bill of exceptions in both cases, together with the endorsements on said papers and documents, as the same now appear on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court, this .... day of June, 1920.

4233 (Seal) L. E. LAMPTON, *County Clerk.*

By ....., *Deputy.*

4234 [TITLE OF COURT AND CAUSE.]

Stipulation.

It is hereby stipulated and agreed by and between the respective counsel for plaintiff and defendants in the above-entitled action, that the foregoing printed transcript on appeal is correct and contains full, true and correct copies of the judgment roll and the notice of appeal in case No. B 43572 and in case No. B 59443; stipula-
4235 tion as to various descriptions and the engrossed bill of exceptions in both cases, together with the endorsements on said papers and documents, all of which papers and documents are a part of the files and records of the Superior Court.

Dated this .... day of June, 1920.

ANDERSON & ANDERSON,
NATHAN NEWBY,
Attorneys for Defendants and Appellants.

4236

A. J. HILL,
County Counsel;
PAUL VALLEE,
Deputy County Counsel;
Attorneys for Plaintiff and Respondent.

Received copy of the within for the judge who tried the case, this 11th day of June, A. D. 1920.

L. E. LAMPTON, *County Clerk,*
By O. M. MCAULAY, JR., *Deputy.*

Due service of the within, and receipt of a copy thereof, is hereby admitted this 11 day of June, A. D. 1920.

A. J. HILL, *County Counsel;*
PAUL VALLEE, *Chief Deputy,*
Attorneys for Respondent.

Civil No. 3533 | Los Angeles County 3533

L. A. No. 6567 | 3533½

County of Los Angeles Plff. and Respdt v. Rindge Company (a corp.) et al., Defts. and Applts. 1920	A. J. Hill, County Counsel Paul Vallee, Deputy " " Anderson & Anderson Nathan Newby

May	7	Filed	Stipulation	
June	11	"	Transcript on Appeal	3 Vols.
"	30	"	Stipulation and Order	
August	13	"	do do	
"	27	"	Appellants' opening brief	
"	30	"	Stipulation and Order	
October	28	"	do " do	
December	3	"	Respondent's brief	
	13	"	Stipulation and order	

1921				
February	15	"	Appellants' reply brief	
	"	"	Exhibit	
March	7	Transferred from the Supreme Court		
			Division One Conrey, P. J.	
April	26	Cause submitted upon the briefs on file		
June	11	Judgments and Orders affirmed Shaw, J.		
August	11	Remittitur to county clerk		
October	5	Filed Petition for Writ of error to U. S. Supreme Court		}
	"	"	Assignment of errors and prayer for reversal	}
	"	"	Order allowing writ and fixing bond	}
	13	"	Undertaking for costs	
	"	"	Writ of Error	
"	5	"	Petition for writ of error to U. S. Supreme Court	}
"	"	"	Assignment of errors and prayer for reversal	} 3533½
	"	"	Order allowing writ and fixing bond	
	13	"	Undertaking for costs	
	"	"	Writ of error	

4243 In the District Court of Appeal, Second Appellate District, state of California, Division One.

Civil No. 3533.

Civil No. 3533½.

County of Los Angeles, plaintiff and respondent, vs. Rindge Company, a corporation, May K. Rindge, Hueneme, Malibu & Southern Railway, a Corporation, and Hueneme, Malibu &
4244 Port Los Angeles Railway, a corporation, defendants and appellants.

County of Los Angeles, plaintiff and respondent, vs. Rindge Company, a corporation, *et al.*, defendants and appellants.

Appeals from the Superior Court of Los Angeles county, Paul J. McCormick, judge.

For appellants — Anderson & Anderson, Nathan Newby.

For Respondent—A. J. Hill, county counsel;
4245 Paul Vallee, chief deputy county counsel.

The above-entitled actions were instituted by the county of Los Angeles to condemn certain lands described in the complaints therein for use as highways. In each case an interlocutory judgment as prayed for was rendered for the plaintiff, followed by a final order of condemnation, from which judgment and order so rendered in each case the defendants therein have appealed.

4246 In the first above entitled case, and which appellants designate the "Main Road" case, the action was to condemn a strip of land from a public highway at a point on the southeasterly boundary line of the Malibu ranch, and through said ranch for a distance of some twenty miles or more to the westerly boundary line of Ventura county, at which point the proposed road terminated upon private land. In the other action, No. 3533½, it was sought to condemn
4247 land for a lateral highway beginning at a point on the proposed "Main Road" and running thence easterly to the east boundary line of the Malibu ranch and terminating likewise upon private lands owned by one Decker, which highway appellants designate as the "Alisos Canyon Road." The questions involved in each case are the same and the grounds upon which appellants base their claim for a reversal are
4248 identical.

In both cases the proceedings were instituted by a resolution adopted *ex parte* and without a hearing accorded defendants by the board of supervisors of Los Angeles county. Omitting the description, the resolution initiating the proceeding as to the "Main Road" case (that adopted in the other being of like form and effect) is as follows:

"Whereas, the public necessity and interest of the people of the county of Los Angeles do

4249 require that a certain highway be constructed in said county over and across those certain parcels of real property hereinafter described, and for that purpose and for such public use it is necessary that those certain pieces or parcels of real property hereinafter described be acquired by said county by condemnation name-'y: the following described property located in the county of Los Angeles, state of California, to-wit:

4250 "(Description of forty-foot right of way strip, and also of some 146 side parcels.) * * * excepting so much of said land as is now included within any public highway, alley or lane.

"Further reference is hereby made to said county surveyor's map No. 8070, on which the location of all parcels of land herein described is accurately shown.

"Now, therefore, be it resolved, and it is the 4251 finding and determination of this board, that the public interest and necessity require the acquisition by the county of Los Angeles of those certain pieces or parcels of land hereinbefore described for a public purpose, namely: for public highway purposes, and for the construction and completion of a public highway thereover; and

"Be it further resolved, that those certain pieces or parcels of land hereinabove described be condemned for a public purpose, namely, for

a public highway and the construction and completion thereof, and the county counsel of the county of Los Angeles is hereby directed to institute proceedings in the Superior Court of the state of California in and for the county of Los Angeles for the condemnation of those certain pieces or parcels of real property hereinabove described for public highway purposes and to take all steps necessary for the condemnation of said pieces or parcels of land in the name of said county;".

in accordance with which the county counsel instituted the actions for the condemnation of the parcels of real estate described therein.

Demurrers interposed by the defendants to the complaints were overruled. Appellants insist that such rulings constituted fatal error for the reason that the powers conferred by law upon the board of supervisors to establish public highways are those *only* embodied in sections of the Political Code numbered 2681 to 2698, inclusive, which procedure therein prescribed is designated the "viewer" method and not infrequently adopted by counties in acquiring lands for highways; hence the resolutions of the board of supervisors authorizing the condemnation suits were not sufficient to confer jurisdiction upon the trial court, from which fact it follows that all proceedings had pursuant to such resolutions were void, including the commencement

of the actions and the judgments and orders appealed from. It is unnecessary to enter upon an extended discussion of appellants' voluminous brief and argument in support of this point. Suffice it to say the identical question, involved in the case of *Adamson v. County of Los Angeles,* reported in volume 34, California Appellate Decisions, page 888, was decided adversely to appellants by the District Court of Appeal for the First District, and a transfer of the case denied by the Supreme Court. In that action Adamson, as a taxpayer, set forth in his complaint the proceedings had and taken by the Board of Supervisors in the acquisition of the property in question, and, insisting the entire proceedings for condemning the same were unauthorized and void, sought to have the county enjoined from proceeding with construction work in the "Main Road" case. In deciding the case the court said: "The provisions of article VI of chapter 2 of title VI of the Political Code, comprising sections 2681 to 2698 thereof, do not purport to be exclusive, and may not be held to be so in view of the express grant of power embodied in subdivision 4 of section 2643 above quoted, and of the even more comprehensive enumeration of the general permanent powers of boards of supervisors contained in section 4041 of the Political Code by which such boards are expressly au-

thorized 'to acquire and take by purchase, *condemnation* or otherwise land for the uses and purposes of public roads, highways and so forth'." The contention of appellant in the Adamson case was identical with that here urged; the argument of appellant there was identical with the argument made in the instant cases; and the adverse decision of the court in that case must be deemed determinative of the same question presented in these appeals.

Another alleged erroneous ruling upon which appellants claim a reversal is that the court, upon defendants' motion for a new trial, denied it upon terms, the effect of which was an exercise by the court of the functions of the jury, by reason of which defendants were deprived of the constitutional right of having a vital element of damage determined by the jury. It appears that, among other things, the jury found it would require 29 miles of fencing to fence the Rindge Company's land along the roadway and that the cost per mile would be $650, aggregating the sum of $18,850. On motion for new trial one of the specifications of error was that the jury improperly determined the number of miles of fencing which would be required, and it being made to appear to the court that, instead of 29 miles, as found by the jury, it would require 31½ miles, the cost of which would be $1,625 more than that found by the

4261 jury, the court, as a condition of its order denying the motion for a new trial, made an order requiring that plaintiff consent to the increase in the judgment; whereupon counsel for plaintiff filed a written stipulation consenting to such increase in the amount of defendants' compensation, and thereupon the court made its order denying the motion for new trial. Upon the same contention, based upon the same facts
4262 and supported by the same argument made by the same attorneys, the court in the Adamson case, *supra*, held that in an action by a county for the condemnation of land for a public highway the county counsel, as attorney representing the county, has authority on a motion for a new trial to consent to an order increasing the amount of compensation awarded to the defendant by the verdict of the jury due to an error in computing the amount of required fenc-
4263 ing of defendant's land along the roadway.

In support of its case plaintiff offered in evidence the resolution, copy of which is hereinbefore set out, together with a minute entry of the board showing that it was adopted by a vote of more than two-thirds of the members thereof. Thereupon plaintiff rested and defendants moved for a nonsuit. The motion was denied, and the ruling is assigned as error.

Section 1241, Code of Civil Procedure, provides that before property can be taken by con-

demnation it must appear: "1. That the use to which it is to be applied is a use authorized by law; 2. That the taking is necessary to such use; provided, when the legislative body of a county * * * shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, * * * by such county * * * of any * * * public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed * * * public improvement; (b) that such property is necessary therefor, and (c) that such proposed * * * public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury."

Since the resolution declaring the land necessary for the proposed highway was adopted by a two-thirds vote of the members of the board of supervisors, it must, as provided by the statute, be accepted as conclusive evidence of the necessity for taking the property, unless, as claimed by appellants, that as so construed it is unconstitutional. This contention is based upon the claim that the determination of the facts so found by the resolution were in their nature

4267 judicial, and since the action of the board in adopting the resolution was had *ex parte* and without notice or hearing given to appellants, the effect of the judgment based thereon was to deprive them of their property without due process of law. That the purpose for which the property was sought to be condemned is a public use, admits of no question. (Sec. 1238, Code Civ. Proc.) When the use is public,
4268 the necessity of appropriating any particular property therefor is not a subject of judicial cognizance, but one which appertains to the legislative branch of the government, and the right to so appropriate may be exercised by the state or such subordinate bodies to which by legislative grant the power is entrusted. See Lewis on Eminent Domain (3rd ed.), Secs. 369, 595 and 596; Cooley on Constitutional Limitations, p. 777; *Secombe v. R. R. Co.*, 90 U. S. 108;
4269 *Miss. etc. Boom Co. v. Patterson*, 98 U. S. 403; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Lamb v. Schottler*, 54 Cal. 319; *Wulzen v. Board of Supervisors*, 101 Cal. 15, and *People v. Smith*, 21 N. Y. 595; all of which are authorities in support of the proposition that, in the absence of constitutional provisions so requiring it—and there are none in this state—the Legislature may delegate to the boards of supervisors of the counties of the state the power to determine *ex parte* by resolution, as in the instant

4270 cases, the necessity for taking property for public use and make such resolution conclusive evidence of the facts enumerated in section 1241, Code of Civil Procedure. In Cooley's Constitutional Limitations, page 760, it is said that "a legislative act declaring the necessity, being the customary mode in which that fact is determined, must be held to be for this purpose 'the law of the land,' and no further finding or adjudication can be essential, unless the Con-
4271 stitution of the state has expressly required it." And at page 777 of the same work it is said that, while the question of necessity may be referred to a local tribunal or submitted to a jury to decide upon evidence, "the parties interested have no constitutional right to be heard upon the question, unless the state Constitution clearly and expressly recognizes and provides for it." *People v. Smith, supra,* is authority
4272 for the statement that the Legislature "may allow the owner to intervene and participate in the discussion before the officer or board to whom the power of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty, without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the Legislature shall, in its dis-

4273 cretion, prescribe." In the case of *Board of Water Commissioners v. Johnson,* 84 Atl. 727, the court said: "But the respondents urge that they have never had the opportunity to be heard upon the question of necessity, and that for that reason there has not been due process of law. They were not entitled to such opportunity. It is well settled that, as related to the exercise of the power of eminent domain, all questions which are political in their nature and
4274 lie within the legislative province may be determined without notice to the owner of the property affected, and * * * the owner is not entitled to a hearing upon it as a matter of right." In *Wulzen v. Board of Supervisors, supra,* it is said: "The determination as to whether or not the right of eminent domain should be exercised and as to what lands are necessary to be taken in the exercise of that
4275 right, is a political and legislative question and not a judicial one. Its determination rests exclusively with the Legislature, or with such subordinate legislative bodies as it may be properly devolved upon; and the question of whether the exercise of the power is wise or not is one with which the judicial department has no concern." Property is held in private ownership subject to the right of the state in its sovereign capacity to take it for public use; the only restriction upon such right being that it

"shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." (Sec. 14, art. I, Const.) Hence, where the owner of land sought to be condemned by the state for a use declared by law to be a public use is accorded his constitutional right to compensation for the taking he cannot question the procedure or instrumentalities which the Legislature has provided as a means for acquiring the property. Its motives or reasons for declaring that it is necessary to take the land are no concern of his. In our opinion, the provision of section 1241, Code of Civil Procedure, making the determination of the board of supervisors of the county conclusive evidence of the necessity for taking the land for a public highway, is not obnoxious to any provision of the State or Federal Constitution.

However, this may be, and contrary to the views herein expressed, the trial court agreed with defendants' contention that the resolution was not conclusive evidence of the facts so found, but did admit it as a sufficient *prima facie* showing of such facts, and upon this theory denied the motion for nonsuit. Thereupon and after the denial of their motion, defendants were given the widest latitude in offering a mass of evidence for the purpose of showing there was

4279 no necessity for the proposed highway, followed by plaintiff, which, in rebuttal, introduced a vast deal of evidence likewise touching the question of necessity for the improvement. Indeed, it appears from the voluminous record that no restrictions whatsoever were imposed upon either party in the introduction of evidence touching the question. Under these circumstances and assuming the court erred in accept-
4280 ing the resolution even as *prima facie* evidence, nevertheless we cannot perceive how defendants were prejudiced by the circumstance, since the testimony which, according to appellants' theory, should have been produced during plaintiff's presentation of its case in chief was later in the trial supplied. The error is predicated solely upon the order in which the evidence touching the question was admitted. "It is well settled that an order denying a motion for a
4281 non-suit will not be disturbed, although the evidence at the close of plaintiff's case was so weak that it might properly have been granted, if upon the trial the defect is overcome by evidence subsequently introduced." (*Peters v. Southern Pacific Co.*, 160 Cal. 48; *Lowe v. San Francisco etc. Ry. Co.*, 154 Cal. 573.) Since both parties were permitted, after the ruling upon the motion, to introduce evidence, without restriction, touching the question of necessity,

4282 defendants could in no event have been prejudiced by the ruling.

As a separate defense the defendants May K. Rindge and Rindge Company alleged that all of the property which plaintiff sought to condemn was within the boundaries of the Malibu ranch in Los Angeles county; that while the ranch was owned in severalty by May K. Rindge and the Rindge Company, it was, and had been for more than twenty years, with
4283 knowledge of plaintiff, operated as a single ranch under one management and control; that the westerly end of said proposed highway terminates at and upon the boundary line between Los Angeles county and Ventura county upon the Malibu ranch which, as owned by defendants, extends into Ventura county for a distance of —— miles, all of which is managed, operated and controlled by said defendants with the lands
4284 of said ranch so located in Los Angeles county; that there is no public road of any kind or character whatever within —— miles of the Ventura county end of said ranch, and the only means of egress and ingress to the westerly terminus of said proposed road is by private trails and ways; that said proposed road or highway, if condemned, would be located wholly and solely upon that part of the Malibu ranch situated in Los Angeles county and would end and terminate upon private property of the Rindge

4285 Company at the Ventura county line, and as constructed would give access wholly and solely to the private ranch property of defendants May K. Rindge and Rindge Company, and could not furnish any way of necessity or convenience to the general public; that the owners of said ranch have no need or desire for a public road thereon, which, if constructed, would be a constant menace and damage to their ranch property; by reason of which facts it is alleged the
4286 taking of said property for the purpose contemplated would be without necessity of any kind or right. Upon the grounds and for the reason that all of the matter so alleged as a separate defense was irrelevant, immaterial, surplusage and conclusions of law, plaintiff moved to strike the same from the answer. This motion was granted, and appellants assign the ruling as error. Counsel for appellants insist
4287 the special defense so pleaded was upon the theory that an isolated road within the boundaries of what is practically one property and not desired by the owners thereof and which could afford no real service to any part of the public as a road, could not possibly be a public necessity for which condemnation would lie. While this contention is fully answered by the fact that the resolution was conclusive evidence of the taking being necessary, nevertheless, conceding such theory warranted by the alleged

facts, it appears that every material issue tendered by the so-called separate defense was not only raised by the complaint and the answers thereto, but that in the trial thereof defendant, without objection or restriction, was accorded every opportunity, of which it availed itself, in offering evidence touching every matter contained in the pleading so stricken out by order of the court. There was no error in the ruling, but conceding as much, it is impossible to perceive how defendants, under the circumstances, could have suffered any prejudice by reason thereof.

It appears that while the eastern terminus of the main road connected with a public highway, the western terminus thereof was at the boundary line separating Los Angeles county from Ventura county, at which point it connected with no road extending into or connecting with roads in said last-named county, and that the Alisos Canyon road, likewise extending from the proposed main road to the boundary line common to the Malibu ranch and the lands of one Decker, was not connected with a highway; and basing their contention upon these facts, appellants insist that the board of supervisors had no power to lay out highways terminating at county lines or points on private lands which did not connect with or intersect other highways affording means of continuous travel.

4291 There is no merit in contention. No such restrictions upon the power of counties to establish highways are imposed by statute, and to hold that a county could not condemn lands for a highway to the line of another county unless there existed an established highway in such latter county with which to connect its proposed road would obviously lead to embarrassment and difficulty in establishing highways from one
4292 county to another. (*Rice v. Rindge*, 53 N. H. 530.)

The use for which the property was sought to be condemned is declared by section 1239, Code of Civil Procedure, to be a public use. The resolution adopted by a vote of two-thirds of the members of the board of supervisors not only vested the court with jurisdiction of the proceedings for condemnation, but when received in evidence the finding and determina-
4293 tion of the board as therein expressed, to the effect that the taking of the parcel of land described in the complaint was necessary for such public use and the proposed improvement located in the manner most compatible with the greatest public good and least private injury, was conclusive evidence of such facts; hence, while not prejudicial, any evidence touching such issue of necessity or hearings had before the board of supervisors other than the resolution, was immaterial. In no event, and from what-

4294 ever angle the facts are viewed, are we able to perceive how defendants' substantial rights were prejudiced by any ruling of the court during the trial.

The judgments and orders are affirmed.

SHAW, *J.*

We concur:

CONREY, *P. J.*

JAMES, *J.*

Endorsed: Original. State of California,
4295 District Court of Appeal, Second Appellate District. Filed Jun. 11, 1921. W. D. Shearer, clerk; by....., deputy.

In the Supreme Court of the state of California in bank.

County of Los Angeles, vs. Rindge Co. *et al.* 2 Civ. No. 3533-2. L. A. No. 6567.

Minutes of Supreme Court.

4296 *By the Court:*

The petition to have the above entitled cause heard and determined by this court after judgment in the District Court of Appeal of the Second Appellate District, Division One, is Denied.

Dated this 8th day of August, 1921.

(All concur except Angellotti C, J., & Wilbur, J., absent.)

I, B. Grant Taylor, clerk of the Supreme Court of the state of Califoria, do hereby cer-

4297 tify that the preceding is a true copy of an order of this court, as shown by the records of my office.

Witness my hand and the seal of the Court this 10th day ofAugust, A. D. 1921.

(Seal) B. GRANT TAYLOR, *Clerk.*
By ERB, *Deputy Clerk.*

In the District Court of Appeal of the state
4298 of California, Second Appellate District. Nos. 3533-3533½.

County of Los Angeles, Plff. and Respdt., vs. Rindge Company *et al.* (a corp.), Defts and Applts.

On Appeal From the Superior Court in and for the County of Los Angeles.

Remittitur.

And now, at this day, this cause being called,
4299 and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by

SHAW, *J.*

We concur:

CONREY, *P. J.*,

JAMES, *J.*

Whereupon, it is ordered, adjudged and decreed by the court that the judgments and orders of the Superior Court in and for the county of

4300 Los Angeles in the above entitled cause, be and the same are hereby affirmed. Respondents to recover costs on appeal.

I, W. D. Shearer, clerk of the District Court of Appeal of the state of California, in and for the Second Appellate District, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 11th day of June, 1921, and now
4301 remaining of record in my office.

Witness my hand and the seal of the Court affixed at my office, this 11th day of August, A. D. 1921.

(Seal) W. D. SHEARER, *Clerk.*

By .....*Deputy Clerk.*

Endorsed: No. In the District Court of Appeal, state of California, Second Appellate District. Remittitur. County of Los Angeles, vs. Rindge Company (a corp.) *et al.*

4302 Filed Aug. 13, 1921. L. E. Lampton, county clerk; by G. W. McDonald, deputy.

Docketed, Sep. 26, 1921; entered, Sep. 26, 1921; books, 431-471, pages 152-266 and 271;

B. B. Rheinstrom, deputy clerk.

4303 In the District Court of Appeal of the state of California, Second Appellate District, Division One.

County of Los Angeles, plaintiff and respondent, vs. Rindge Company (a corporation), May K. Rindge, *Huneme*, Malibu & Southern Railway (a corporation), and *Huneme*, Malibu & Port Los Angeles Railway (a corporation), defendants and appellants. Civil No. 3533.

4304 **Petition for Writ of Error.**

Considering themselves aggrieved by the final judgment and decree of the District Court of Appeal of the state of California, Second Appellate District, Division One, rendered against them in the above-entitled cause (a hearing in bank of said cause by the Supreme Court of the state of California having upon application therefor by them been denied, and said
4305 judgment and decree being that of the court of last resort in California), as will more fully appear from the assignment of errors exhibited herewith, the defendants and appellants in said cause, and each and all and every of said defendants and appellants, hereby pray that a writ of error may issue, and that they may be allowed to bring up for review before the Supreme Court of the United States the judgment and decree of said District Court of Appeal of the

4306 *the* state of California, Second Appellate District, Division One, in the above-entitled cause.

Dated: October 5th, 1921.

ANDERSON & ANDERSON,
NATHAN NEWBY and
GRANT JACKSON,
Attorneys for Defendants and Appellants.

Endorsed: Original No. 3533, state of California, District Court of Appeal, Second Appellate District.

4307 Filed Oct. 5, 1921. W. D. Shearer, clerk; by H. C. Lillie, deputy.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

County of Los Angeles, plaintiff and respondent, vs. Rindge Company (a corporation), May K. Rindge, *Huneme*, Malibu & Southern
4308 Railway (a corporation), and *Huneme*, Malibu & Port Los Angeles Railway (a corporation), defendants and appellants. Civil No. 3533.

Order Allowing Writ and Fixing Bond.

Upon reading the foregoing petition of the defendants and appellants in the above-entitled cause, it is ordered that a writ of error issue as therein prayed upon the execution by said defendants and appellants of a bond for costs

to the county of Los Angeles, plaintiff and respondent in said cause, in the sum of $1000.00.

Dated: October 5th, 1921.

N. P. CONREY,

Presiding Judge of the District Court of Appeal of the State of California, Second Appellate District, Division One.

Endorsed: Original No. 3533, state of California, District Court of Appeal, Second Appellate District.

Filed Oct. 5, 1921. W. D. Shearer, clerk; by H. C. Lillie, deputy.

In the Supreme Court of the United States.

Rindge Company, a Corporation; May K. Rindge, Hueneme, Malibu & Southern Railway, a corporation, and Hueneme, Malibu & Port Los Angeles Railway, a corporation, plaintiffs in error, vs. County of Los Angeles, defendants in error.

Assignment of Errors and Prayer for Reversal.

Now come the above-named plaintiffs in error in the above-entitled cause, and file herewith their petition for a writ of error and say there are errors in the records and proceedings in the above-entitled cause in the District Court of Appeal of the state of California, Second Appellate District, Division One, the court of

4312 last resort in said state in said cause, and for the purpose of having the same reviewed in the Supreme Court of the United States make the following assignment of errors:

I.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding against the contention of the plaintiffs in error that the tak-
4313 ing of the property involved in said suit for an alleged public road and highway and sought therein to be condemned for such purposes was necessary for a public use, and that it could under any circumstances afford any accommodation of any kind or character to the traveling public, or any part or portion of such traveling public, or that, therefore, the taking of the same for highway purposes would not be without due process of law and would not be in violation
4314 of the provisions of the Fourteenth Amendment to the Constitution of the United States, and that the taking of said property under the resolution in said suit for public highway or other purposes would not be void and would not be a denial to the plaintiffs in error of equal protection of the laws under the Constitution of the United States and would not contravene the Fourteenth Amendment to the said Constitution of the United States.

4315

II.

That the said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the ruling of the lower court in striking out the second, further and separate answer and defense of the defendant, May K. Rindge, in her amended answer in the above-entitled cause, which was and is in the words and figures
4316 following, to-wit:

"And for another and further and separate answer and defense this defendant alleges:

"I.

"That all of the properties described in paragraphs II and VI of the complaint and in any way involved in this action are entirely upon and within the boundaries of that certain ranch situate in the county of Los Angeles, state of California, commonly known as the Malibu
4317 Ranch.

"II.

"That while a portion of said Malibu Ranch is owned by the defendant, May K. Rindge, and the remaining portion thereof by the defendant Rindge Company, the said ranch as a whole is now, and was at the commencement of this action, and for more than twenty years prior thereto had been, treated, operated, managed and controlled as a single ranch under one joint management and control; and has

at no time ever been severed or segregated into parts or parcels or treated or handled or managed by the owners thereof as other than a single ranch and holding.

"III.

"That said method of holding, managing and controlling said ranch by its said two owners has at all times been known to the plaintiff and to the public in general.

"IV.

"That said Malibu Ranch as such and under that name and designation and as embraced in the original purchase of the same by the defendant, May K. Rindge, and the predecessor in interest of the defendant, Rindge Company, at the point where the proposed road sought to be condemned herein terminates at the westerly end of said road, ends at and upon the boundary line between the counties of Los Angeles and Ventura, state of California; but that the defendant, Rindge Company, is the owner and in the possession of, and was at the date of the commencement of this action, the owner and in the possession of property immediately adjacent thereto in the said county of Ventura, and forming a continuation into said county of Ventura for a distance of about 1¾ miles of the said ranch under the said joint management and control of the

said defendants, May K. Rindge and Rindge Company.

"V.

"That there was not at the commencement of this action and is not now in the said county of Ventura at any point either contiguous to or upon any part or portion of said property of the Rindge Company or within ten miles of the western, that is to say, the Ventura county, end of said ranch, any public road of any kind or character whatever; and that said ranch can be reached from said end only and wholly by private trails and ways.

"VI.

"That there was not at the commencement of this action, and is not now, any public road or way of any kind or character either upon that portion of said Malibu Ranch located in Los Angeles county or upon that extension of the same in Ventura county; and that the said proposed road or highway sought to be condemned and taken in this action would, if condemned and taken, be located wholly and solely upon that portion of the said Malibu Ranch situated in Los Angeles county, would end and terminate upon the private property of the defendant, Rindge Company, at the Ventura county line; would have no laterals or outlets or feeders of any kind or character; would be located wholly and solely upon, and

give access wholly and solely to, the private ranch property of the defendants, May K. Rindge and Rindge Company; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel.

"VII.

"That neither of said defendants, owners of and jointly managing and controlling said Malibu Ranch as a whole, has any need or desire for said or any public road upon said ranch or upon any part or portion thereof; but that, on the contrary, any such public road would be a constant and continuous menace and damage to their said ranch property, and would largely destroy its value as a unit for ranch purposes; and would be and constitute a continual nuisance and expense to the said defendants.

"VIII.

"That by reason of the premises the taking of any part or portion of said property as contemplated by the plaintiff and as prayed for in the complaint for road or highway purposes would be without necessity of any kind or right, and in contravention of the provisions of the Constitution of the United States, and particularly in violation of the Fourteenth Amendment to said Constitution, and would be void and without due process of law, and constitute a

denial to the defendants, May K. Rindge and the Rindge Company, of the equal protection of the laws under the Constitution of the United States, and would contravene the said Fourteenth Amendment to said Constitution."

III.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the ruling of the lower court in striking out the third separate answer and defense of the defendant, Rindge Company, in the above-entitled cause, which was and is in the words and figures following, to-wit:

"I.

"That all of the properties described in paragraphs II and VI of the complaint and in any way involved in this action are entirely upon and within the boundaries of that certain ranch situate in the county of Los Angeles, state of California, commonly known as the Malibu Ranch.

"II.

"That while a portion of said Malibu Ranch is owned by the defendant May K. Rindge, and the remaining portion thereof by the defendant Rindge Company, the said ranch as a whole is now, and was at the commencement of this action, and for more than twenty years prior thereto had been, treated, operated, managed and

controlled as a single ranch under one joint management and control; and has at no time ever been severed or segregated into parts or parcels or treated or handled or managed by the owners thereof as other than a single ranch and holding.

"III.

"That said method of holding, managing and controlling said ranch by its said two owners has at all times been known to the plaintiff and to the public in general.

"IV.

"That said Malibu Ranch as such and under that name and designation and as embraced in the original purchase of the same by the defendant May K. Rindge, and the predecessor in interest of the defendant Rindge Company, at the point where the proposed road sought to be condemned herein terminates at the westerly end of said road, ends at and upon the boundary line between the counties of Los Angeles and Ventura, state of California; but that the defendant Rindge Company is the owner and in the possession of, and was at the date of the commencement of this action, the owner and in the possession of property immediately adjacent thereto in the said county of Ventura, and forming a continuation into said county of Ventura for a distance of about 1¾ miles of the said ranch under the said

joint management and control of the said defendants, May K. Rindge and Rindge Company.

"V.

"That there was not at the commencement of this action and is not now in the said county of Ventura at any point either contiguous to or upon any part or portion of said property of the Rindge Company or within ten miles of the western, that is to say, the Ventura county, end of said ranch any public road of any kind or character whatever; and the said ranch can be reached from said end only and wholly by private trails and ways.

"VI.

"That there was not at the commencement of this action, and is not now, any public road or way of any kind or character either upon that portion of said Malibu Ranch located in Los Angeles county, or upon that extension of the said in Ventura county; and that the said proposed road or highway sought to be condemned and taken in this action would, if condemned and taken, be located wholly and solely upon that portion of said Malibu Ranch situated in Los Angeles county, would end and terminate upon the private property of the defendant Rindge Company at the Ventura county line; would have no laterals or outlets or feeders of any kind or character; would be

4336 located wholly and solely upon, and give access wholly and solely to, the private ranch property of the defendants May K. Rindge and Rindge Company; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel.

"VII.

"That neither of said defendants owners of and jointly managing and controlling said Malibu Ranch as a whole, has any need or
4337 desire for said or any public road upon said ranch or upon any part or portion thereof; but that, on the contrary, any such public road would be a constant and continuous menace and damage to their said ranch property, and would largely destroy its value as a unit for ranch purposes; and would be and constitute a continual nuisance and expense to the said defendants.

4338 "VIII.

"That by reason of the premises the taking of any part or portion of said property as contemplated by the plaintiff and as prayed for in the complaint for road or highway purposes would be without necessity of any kind or right, and in contravention of the provisions of the Constitution of the United States, and particularly in violation of the Fourteenth Amendment to said Constitution, and would be void and without due process of law, and constitute a

4339 denial to the defendants May K. Rindge and Rindge Company of the equal protection of the laws under the Constitution of the United States, and would contravene the said Fourteenth Amendment to said Constitution."

IV.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the ruling of
4340 the lower court against the said above-quoted third and separate answer and defense of the defendant Rindge Company in the above-entitled cause.

V.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding that the following provisions of Sec. 1241 of the Code of Civil Procedure of the state of California, in force
4341 at all times during the pendency of the proceedings involved in the above-entitled cause, to-wit:

"Provided, when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town,

of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury."

were and are constitutional, and were not in violation of the provisions of the Federal Constitution prohibiting the taking of property without due process of law, and were not violative of the Fourteenth Amendment to the Constitution of the United States, and were not obnoxious to any provision of the State or Federal Constitution, and in particular that portion thereof which prescribes that such resolution referred to in said Sec. 1241 of the said Code of Civil Procedure if passed by a vote of two-thirds of all of the members of any such legislative body shall be conclusive evidence of the various matters and things set forth and prescribed in said section as necessary to appear before property can be taken by condemnation.

VI.

Said District Court of Appeal of the state of California, Second Appellate District, Di-

4345 vision One, erred in holding and deciding that the county of Los Angeles was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deprive these plaintiffs in error of their property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

VII.

4346 Said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the county of Los Angeles, the defendant in error, was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deny to these plaintiffs in error the equal protection of the law contrary to the provisions of the
4347 Fourteenth Amendment to the Constitution of the United States.

VIII.

That the said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the property of these plaintiffs in error was not in and by the necessary force and effect of the judgment of the Superior Court of the state of California in said cause taken for public use without due process of law contrary

4348 to the provisions of the Constitution of the United States, and particularly to the provisions of the Fourteenth Amendment thereto.

IX.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following finding of fact by the lower court in the above-entitled cause:

4349 "That it is necessary for highway purposes, and the public interest, convenience and necessity require, the acquisition of an easement in and over the properties particularly described in paragraph II of the said complaint for the construction, establishment and maintenance of a public highway, as prayed in said complaint, and that the use to which the property sought to be taken is to be applied, is a use authorized by law."

4350 X.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following finding of fact by the lower court in the above-entitled cause:

"That it is not true that there has been no consideration or determination of the board of supervisors of the county of Los Angeles of any of the matters or things alleged in said complaint, and particularly of the matters or

things alleged in paragraph II of said complaint, nor is it true that the resolution referred to in paragraph II of said complaint was arbitrarily adopted by said board of supervisors, without any consideration of the matters or things therein contained, or without the exercise of any discretion therein, or well knowing that there was no room for the exercise of any discretion therein, or that it was arbitrarily adopted at all, nor is it true that said resolution was adopted by said board of supervisors knowing full well, or otherwise, that all, or that any of the property proposed to be taken for public road and highway, and to be condemned, as in said resolution set forth and as in the complaint alleged, was not, and could not be necessary for any public use of any kind or character whatever, and cannot, under any circumstances, afford any accommodation of any kind or character to the traveling public, or any part or portion thereof, and that the taking of same for said highway purposes would be without due process of law or in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, or that the taking of said property under said resolution for public highway or other purposes, would be void, or would be a denial to the defendants, or to any or either of them, of the equal protection of the laws under the Constitution of

4354 the United States, and would contravene the Fourteenth, or any amendment to said Constitution, and in this behalf the court finds that it is true that the property proposed to be taken for public road and highway, and sought to be condemned herein, is located wholly and solely upon and within the confines of private property, except that the easterly end of the strip of land sought to be taken terminates at, and will be in continuation of, a public high-
4355 way now, and prior to the commencement of this action, existing; and the court further finds that the highway sought to be established and maintained over and upon the land sought to be taken, and for the purpose of which the taking is sought, will afford accommodation to the traveling public."

XI.

That said District Court of Appeal of the
4356 state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause:

"That it is necessary for highway purposes, and the public interest, convenience and necessity require, the acquisition of an easement in and over the property particularly described in the amended complaint in paragraph number II thereof, for the construction, establishment and maintenance of a public highway."

4357 XII.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause.

"That the use to which the property sought to be taken is to be applied, is a use authorized by law."

XIII.

4358 That the property of the plaintiffs in error sought to be condemned in this action and included in the judgment of condemnation for alleged highway purposes consists of a strip of land forty feet in width running for a length of about twenty-one miles into and exclusively upon the real property in Los Angeles county, California, owned and operated in common by the Rindge Company, a corporation, and May K. Rindge, two of the above named petitioners, and
4359 one hundred and forty-nine additional parcels adjoining and contiguous to said forty-foot strip, and all upon and within the exterior boundaries of said lands of said petitioners, Rindge Company and May K. Rindge.

For the errors aforesaid these plaintiffs in error pray that the final judgment of the District Court of Appeal of the state of California, Second Appellate District, Division One, made and rendered in said cause on the 11th day of June, 1921, and which thereafter became

final on the 10th day of August, 1921, be reversed and a judgment rendered in favor of said plaintiffs in error, and for costs.

J. H. ANDERSON,
W. H. ANDERSON,
NATHAN NEWBY,
GRANT JACKSON,
Attorneys for Plaintiffs in Error.

Endorsed: Original No. 3533, Rindge Co., a corporation, *et al.*, plaintiffs in error vs. County of Los Angeles, defendants in error, state of California, District Court of Appeal, Second Appellate District.

Filed Oct. 5, 1921. W. D. Shearer, clerk; by H. C. Lillie, deputy.

Writ.

Civil No. 3533.

The President of the United States of America to the Honorable the Judges of the District Court of Appeal of the State of California Second Appellate District, Division One:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, being the highest court of law or equity of the said state in which (under the circumstances of this case) a decision could be had between the County of Los Angeles, as plaintiff, and Rindge Com-

4363 pany (a corporation), May K. Rindge, Hueneme Malibu & Southern Railway (a corporation), and Hueneme, Malibu & Port Los Angeles Railway (a corporation), as defendants, wherein was drawn in question the validity of a treaty of or a statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an 4364 authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said 4365 Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of said Rindge Company (a corporation), May K. Rindge, Hueneme, Malibu & Southern Railway (a corporation), and Hueneme, Malibu & Port Los Angeles Railway (a corporation), as by their complaint appears: We being willing that error, if any hath been done, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given,

4366 that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right,
4367 and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, chief justice of the United States, the 11th day of October, in the year of our Lord one thousand nine hundred a*dn* twenty-one.

(Seal) CHAS. N. WILLIAMS,

Clerk of the District Court of the United States, Southern District of California.

4368 Allowed, October 11th, 1921.

N. P. CONREY,

Presiding Justice of the District Court of Appeal of the State of California, Second Appellate District, Division One.

Endorsed: Original, Civil No. 3533, in the Supreme Court of the United States, County of Los Angeles, plaintiff, vs. Rindge Company *et al.*, defendants, state of California, District Court of Appeal, Second Appellate District.

4369 Filed Oct. 13, 1921. W. D. Shearer, clerk; by ————, deputy.

In the Supreme Court of the United States.

Rindge Company (a corporation), May K. Rindge, Hueneme, Malibu & Southern Railway (a corporation), and Hueneme, Malibu & Port Los Angeles Railway (a corporation), plaintiffs in error, vs., County of Los Angeles, defend-
4370 ant in error.

Undertaking for Costs on Petition for Writ of Error.

Know all men by these presents: That we, Rindge Company (a corporation), May K. Rindge, Hueneme, Malibu & Southern Railway (a corporation), and Hueneme, Malibu & Port Los Angeles Railway (a corporation), the plaintiffs in error in the above-entitled cause, as
4371 principals, and M. K. Rindge and R. R. Adamson, as sureties, are held and firmly bound unto the County of Los Angeles, California, the defendant in error in said cause, in the sum of one thousand ($1000.00) dollars, to be paid to said defendant in error, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 7th day of Oct., 1921.

4372 Whereas, the above-named plaintiffs in error seek to prosecute their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above mentioned cause by the District Court of Appeal of the state of California, Second Appellate District, Division One.

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute said writ of error to
4373 effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

This bond and undertaking is given and made on behalf of all of the plaintiffs in error above named, and is and shall be binding upon each and all of said plaintiffs in error and said sureties above named, jointly and severally, although
4374 these presents may not be executed by all of said plaintiffs in error.

RINDGE COMPANY,
By M. K. RINDGE,
President.

By R. R. ADAMSON,
Secretary.

(Seal)

HUENEME, MALIBU & SOUTHERN RAILWAY,
By M. K. RINDGE,
President,

By FREDERICK H. RINDGE,
Secretary.

(Seal)

4375 HUENEME, MALIBU & PORT LOS ANGELES RAILWAY,

By M. K. RINDGE,
President,
By F. B. SCOTTON,
Secretary.

M. K. RINDGE,
(Seal) R. R. ADAMSON,

State of California, County of Los Angeles—ss.

4376 M. K. Rindge and R. R. Adamson, the sureties whose names are subscribed to the foregoing undertaking, being severally duly sworn, each for himself says: That he is a resident and householder within the state of California, and is worth the sum for which he becomes surety on said undertaking, over and above all of his just debts and liabilities, exclusive of property exempt from execution.

4377 M. K. RINDGE,
R. R. ADAMSON.

Subscribed and sworn to before me this 10th day of October, 1921.

(Seal) LOUISE WULFF,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires December 10, 1923.

Approved as to form:
A. J. HILL,
County Counsel of the County of Los Angeles, Calif.,

4378 PAUL VALLEE,
Deputy County Counsel of Said County,
Attorneys for Defendant in Error.

Dated: Oct. 10, 1921.

Bond approved: Dated Oct. 11, 1921.

N. P. CONREY,
Presiding Justice of the District Court of Appeal of the State of California, Second Appellate District, Division One.

Endorsed: Original, in the Supreme Court
4379 of the United States, Rindge Company, a corporation *et al.*, plaintiffs in error, vs. County of Los Angeles, defendant in error, state of California, District Court of Appeal, Second Appellate District.

Filed Oct. 13, 1921. By W. D. Shearer, clerk; by ————, deputy.

Citation.

4380 *The President of the United States of America to the County of Los Angeles, California, Greeting:*

You are hereby cited and admonished to appear at and before the Supreme Court of the United States, at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the District Court of Appeal of the state of California, Second Appellate District, Division One, wherein Rindge Company (a cor-

poration), May K. Rindge, Hueneme, Malibu & Southern Railway (a corporation), and Hueneme, Malibu & Port Los Angeles Railway (a corporation), are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the presiding justice of the District Court of Appeal of the state of California, Second Appellate District, Division One, this 11 day of October, 1921.

N. P. CONREY,

Presiding Justice of the District Court of Appeal of the State of California, Second Appellate District, Division One.

We, attorneys of record for the defendant in error in the foregoing entitled cause, hereby acknowledge receipt of a copy of the foregoing citation, and enter appearance in the Supreme Court of the United States, October 13th, 1921.

A. J. HILL,

County Counsel of the County of Los Angeles, State of California, and

PAUL VALLEE,

Chief Deputy County Counsel of Said County,

Attorneys for the County of Los Angeles, California, Defendant in Error.

4384 Endorsed: Original, 3533, in the Supreme Court of the United States, Rindge Company, a corporation, plaintiff in error, vs. County of Los Angeles, defendant in error, state of California, District Court of Appeal, Second Appellate District.

Filed Oct. 13, 1921. W. D. Shearer, clerk; by————, deputy.

4385 In the District Court of Appeal of the state of California, Second Appellate District, Division One.

County of Los Angeles, plaintiff and respondent, vs. Rindge Company (a corporation), defendant and appellant. Civil No. 3533-1/2.

Petition for Writ of Error.

Considering itself aggrieved by the final judgment and decree of the District Court of Appeal
4386 of the state of California, Second Appellate District, Division One, rendered against it in the above-entitled cause (a hearing in bank of said cause by the Supreme Court of the state of California having upon application therefor by it been denied, and said judgment and decree being that of the court of last resort in California), as will more fully appear from the assignment of errors exhibited herewith, the defendant and appellant in said cause hereby prays that a writ of error may issue, and that

4387 it may be allowed to bring up for review before the Supreme Court of the United States the judgment and decree of said District Court of Appeal of the state of California, Second Appellate District, Division One, in the above-entitled cause.

Dated October 5th, 1921.

ANDERSON & ANDERSON,
NATHAN NEWBY,
4388 GRANT JACKSON,
Attorneys for Defendant and Appellant.

Endorsed: Original, Civil No. 3533½. State of California, District Court of Appeal, Second Appellate District.

Filed Oct. 5, 1921. W. D. Shearer, clerk; by H. C. Lillie, deputy.

In the District Court of Appeal of the state of California, Second Appellate District, Di-
4389 vision One.

County of Los Angeles, plaintiff and respondent, vs. Rindge Company (a corporation), defendant and appellant. Civil No. 3533-1/2.

Order Allowing Writ and Fixing Bond.

Upon reading the foregoing petition of the defendant and appellant in the above-entitled cause, it is ordered that a writ of error issue as therein prayed upon the execution by said defendant and appellant of a bond for costs to

4390 the county of Los Angeles, plaintiff and respondent in said cause, in the sum of $1000.00.

Dated October 5th, 1921.

N. P. CONREY,

Presiding Judge of the District Court of Appeal of the State of California, Second Appellate District, Division One.

Endorsed: Original, No. 3533½, state of California, District Court of Appeal, Second Appellate District.

4391 Filed Oct. 5, 1921. W. D. Shearer, clerk; by H. C. Lillie, deputy.

In the Supreme Court of the United States.

Rindge Company, a corporation, plaintiff in error, vs. County of Los Angeles, defendant in error.

Assignment in Error and Prayer for Reversal.

4392 Now comes the above-named plaintiff in error in the above-entitled cause, and files herewith its petition for a writ of error and says there are errors in the records and proceedings in the above-entitled cause in the District Court of Appeal of the state of California, Second Appellate District, Division One, the court of last resort in said state in said cause, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment of errors:

4393 I.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the finding in the above-entitled cause that the following allegation of paragraph II of the complaint in said cause was true, to-wit:

"That the public interest and necessity require the construction of a public highway over
4394 the property hereinafter described," namely: the property described in said complaint and condemned in said action.

II.

That the said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the finding in the above-entitled cause that the following allegation of paragraph II of the complaint in said cause was true, to-wit:

4395 "That for the purpose of constructing a public highway the acquisition of said property is necessary, namely: that certain parcel of land situate in the county of Los Angeles, and described as being," describing the property condemned in said action.

III.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the follow-

ing finding of the trial court in the above-entitled cause, to-wit:

"That it is not true that there has been no consideration or determination by the board of supervisors of the county of Los Angeles of any of the matters or things alleged in said complaint and particularly of the matters or things alleged in paragraph IV of said complaint, nor is it true that the resolution referred to in paragraph IV of said complaint was arbitrarily adopted by said board of supervisors, without any consideration of the matters or things therein contained, or without the exercise of any discretion therein, or well knowing that there was no room for the exercise of any discretion therein, or that it was arbitrarily adopted at all, nor is it true that said resolution was adopted by said board of supervisors knowing full well, or otherwise, or at all, that any of the property proposed to be taken for a public road and highway, and to be condemned, as in said resolution set forth and as in complaint alleged, was not, and could not be necessary for any public use of any kind or character whatever, and cannot, under any circumstances, afford any accommodation of any kind or character to the traveling public, or any part or portion thereof, and that the taking of same for said highway purposes would be without due process of law or in violation of the pro-

visions of the Fourteenth amendment to the Constitution of the United States, or that the taking of said property under said resolution for public highway or other purposes, would be void, or would be a denial to the defendant, of the equal protection of the laws under the Constitution of the United States, and would contravene the Fourteenth, or any amendment to said Constitution, and in this behalf the court finds: that it is true that the property proposed to be taken for a public road and highway, and sought to be condemned herein, is located wholly and solely upon and within the confines of private property, except that the southerly end of the strip of land sought to be taken terminates at, and will connect with, another strip of land sought to be acquired by the plaintiff in another action (which other action was tried at the same time as, and with this action, and before the same court and jury) brought for the purpose of condemning said last mentioned strip of land for public highway purposes, and the court further finds that the highways sought to be established and maintained over and upon the land sought in this action to be taken and for the purpose of which the taking is sought, will afford accommodation to the traveling public."

4402 IV.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause, to-wit:

"That it is necessary for highway purposes, and the public interest, convenience and necessity require, the acquisition of an easement in and over the property particularly described in
4403 the amended complaint in paragraph number II thereof, for the construction, establishment and maintenance of a public highway."

V.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause, to-wit:

4404 "That the use to which the property sought to be taken is to be applied, is a use authorized by law."

VI.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding that the following provisions of Sec. 1241 of the Code of Civil Procedure of the state of California, in force at all times during the pendency of the proceedings involved in the above-entitled cause, to-wit:

"Provided, when the legislative body of a county, city and county, or an incorporated city or town, shall by resolution or ordinance, adopted by vote of two-thirds of all its members have found and determined that the public interests and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury," were and are constitutional, and were not in violation of the provisions of the Federal Constitution prohibiting the taking of property without due process of law, and were not violative of the Fourteenth Amendment to the Constitution of the United States, and were not obnoxious to any provision of the State or Federal Constitution, and in particular that portion thereof which prescribes that such resolution referred to in said Sec. 1241 of the said Code of Civil Procedure if passed by a vote

of two-thirds of all of the members of such a legislative body shall be conclusive evidence of the various matters and things set forth and prescribed in said section as necessary to appear before property can be taken by condemnation.

VII.

Said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the county of Los Angeles was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deprive these plaintiffs in error of their property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

VIII.

Said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the county of Los Angeles, the defendant in error, was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deny to these plaintiffs in error the equal protection of the law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

4411 IX.

That the said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the property of these plaintiffs in error was not in and by the necessary force and effect of the judgment of the Superior Court of the state of California in said cause taken for public use without due process of law contrary to
4412 the provisions of the Constitution of the United States, and particularly to the provisions of the Fourteenth Amendment thereto.

For the errors aforesaid the plaintiff in error prays that the final judgment of the District Court of Appeal of the state of California, Second Appellate District, Division One, made and rendered in said cause on the 11th day of June, 1921, and which thereafter became final on the 10th day of August, 1921, be reversed and a
4413 judgment rendered in favor of said plaintiff in error, and for costs.

J. A. ANDERSON,
W. H. ANDERSON,
NATHAN NEWBY,
GRANT JACKSON,
Attorneys for Plaintiff in Error.

Endorsed: Original, 3533[1/] in the Supreme Court of the United States, Rindge Company, a corporation, plaintiff in error, vs. County of Los Angeles, defendant in error, state of Cali-

4414 fornia, District Court of Appeal, Second Appellate District.

Filed Oct. 5, 1921. W. D. Shearer, clerk; by H. C. Lillie, deputy.

Writ of Error.

Civil No. 3533-1/2.

The President of the United States of America to the Honorable the Judges of the

4415 *District Court of Appeal of the State of California, Second Appellate District, Division One:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, being the highest court of law or equity of the said state in which (under the circumstances of this case) a decision could be had between the

4416 County of Los Angeles, as plaintiff, and Rindge Company (a corporation), as defendant, wherein was drawn in question the validity of a treaty of or a statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their

validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of said Rindge Company (a corporation), as by its complaint appears: We being willing that error, if any hath been done, should be corrected, and full and speedy justice be done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings of aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, chief justice of the United States, the 11th day

of October, in the year of our Lord one thousand nine hundred and twenty-one.

(Seal) CHAS. N. WILLIAMS,
Clerk of the District Court of the United States, Southern District of California.

Allowed, October 11th, 1921.

N. P. CONREY,
Presiding Justice of the District Court of Appeal of the State of California, Second Appellate District, Division One.

Endorsed: Original. Civil No. 3533½. In the Supreme Court of the United States, County of Los Angeles, plaintiff, vs. Rindge Company, a corporation, defendant. State of California, District Court of Appeal, Second Appellate District.

Filed Oct. 13, 1921. W. D. Shearer, clerk; by ....., deputy.

In the Supreme Court of the United States.

Rindge Company (a corporation), plaintiff in error, vs. County of Los Angeles, defendant in error.

Undertaking for Costs on Petition for Writ of Error.

Know all men by these presents, that we, Rindge Company (a corporation), the plaintiff in error in the above-entitled cause, as principal, and M. K. Rindge and R. R. Adamson, as sureties, are held and firmly bound unto the county of Los Angeles, California, the defend-

4423 ant in error in said cause, in the sum of one thousand dollars ($1000.00) dollars, to be paid to said defendant in error, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 7th day of Oct., 1921.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse
4424 the judgment rendered in the above-mentioned cause by the District Court of Appeal of the state of California, Second Appellate District, Division One.

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute said writ of error to effect and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

4425 This bond and undertaking is given and made on behalf of the plaintiff in error above named, and is and shall be binding upon said plaintiff in error and said sureties above-named, jointly and severally.

RINDGE COMPANY,
By M. K. RINDGE,
President.
By R. R. ADAMSON,
(Seal) *Secretary.*
M. K. RINDGE,
R. R. ADAMSON.

4426 State of California, County of Los Angeles—ss.

M. K. Rindge and R. R. Adamson, the sureties whose names are subscribed to the foregoing undertaking, being severally duly sworn, each for himself says: That he is a resident and householder within the state of California, and is worth the sum for which he becomes surety on said undertaking, over and above all of his just debts and liabilities, exclusive of property exempt from execution.

4427 M. K. RINDGE,
R. R. ADAMSON.

Subscribed and sworn to before me, this 7th day of October, 1921.

(Seal) LOUISE WULFF,
Notary Public in and for the County of Los Angeles, State of California.

Approved as to form:

A. J. HILL,
County Counsel of the County of Los Angeles,
4428 *California.*

PAUL VALLEE,
Deputy County Counsel of Said County,
Attorneys for Defendant in Error.

Dated Oct. 10, 1921.

Bond approved:
Dated Oct. 11, 1921.

N. P. CONREY,
Presiding Justice of the District Court of Appeal of the State of California, Second Appellate District, Division One.

4429 Endorsed: Original. In the Supreme Court of the United States. Rindge Company, a corporation, plaintiff in error, vs. County of Los Angeles, defendant in error. State of California, District Court of Appeal, Second Appellate District.

Filed Oct. 13, 1921. W. D. Shearer, clerk; by ....., deputy.

4430 **Citation.**

The President of the United States of America to the County of Los Angeles, California, Greeting:

You are hereby cited and admonished to appear at and before the Supreme Court of the United States, at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of
4431 the District Court of Appeal, of the state of California, Second Appellate District, Division One, wherein Rindge Company (a corporation), is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness the presiding justice of the District Court of Appeal, of the state of California, Second Appellate District, Division One, this 11 day of October, 1921.

N. P. CONREY,

Presiding Justice of the District Court of Appeal of the State of California, Second Appellate District, Division One.

We, attorneys of record for the defendant in error in the foregoing entitled cause, hereby acknowledge receipt of a copy of the foregoing citation, and enter appearance in the Supreme Court of the United States, October 13th, 1921.

A. J. HILL,

County Counsel of the County of Los Angeles, State of California, and

PAUL VALLEE,

Chief Deputy County Counsel of Said County, Attorneys for the County of Los Angeles, California, Defendant in Error.

Endorsed: Original. 3533½. In the Supreme Court of the United States. Rindge Company, a corporation, *et al.*, plaintiffs in error vs. County of Los Angeles, defendant in error. State of California, District Court of Appeal, Second Appellate District.

Filed Oct. 13, 1921. W. D. Shearer, clerk; by ....., deputy.

4435 Civil Nos. 3533-3533½.

In the District Court of Appeal, state of California, Second Appellate District, Division One.

I, W. D. Shearer, clerk of the above entitled court, do hereby certify that the foregoing documents, to wit: Transcript on appeal, register of actions, opinion of the court, order of Supreme Court denying petition for rehearing, remittitur, petition for writ of error, order allow-
4436 ing writ and fixing bond, assignment of errors and prayer for reversal, writ of error, undertaking for costs on petition for writ of error, citation, constitute a full and complete transcript of the record and proceedings in the case of County of Los Angeles vs. Rindge Company, a corporation, *et al.*, as the same now appear on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my
4437 office in Los Angeles, California, this.....day of December, A. D. 1921.

Clerk of the District Court of Appeal, State of California, Second Appellate District, Division One.

4438 In the Supreme Court of the United States, October Term, 1921.

Rindge Company, a Corporation, May K. Rindge, Hueneme, Malibu & Southern Railway, a Corporation, and Hueneme, Malibu & Port Los Angeles Railway, a Corporation, plaintiffs in error, vs. County of Los Angeles, defendant in error.

Rindge Company (a Corporation), plaintiff in error, vs. County of Los Angeles, defendant in error.

Stipulation That but One Record Upon Writs
4439 **of Error in the Above Entitled Causes Need Be Printed and Filed, and That Said Causes May Be Heard and Decided Together on Said Record.**

It is hereby stipulated and agreed by and between the respective counsel for the parties in the above-entitled causes, subject to the approval of the court, that upon the writs of error heretofore issued in said causes one record only need be printed and filed, and that the said causes upon said writs of error may be heard and decided together by the above-entitled court and
4440 may be determined upon the said record so printed in said causes.

Dated November 3, 1921.

_____

_____

_____

_____

Attorneys for Plaintiffs in Error.

_____

County Counsel,

_____

Chief Deputy County Counsel,
Attorneys for Defendants in Error.

4441 In the Supreme Court of the United States.
October Term, 1921.

Rindge Company, a corporation, *et al.*, plaintiffs in error, vs. County of Los Angeles, defendant in error. Civil No. 3533.

Rindge Company, a corporation, plaintiff in error, vs. County of Los Angeles, defendant in error. Civil No. 3533½.

Stipulation.

4442 It is hereby stipulated by and between the parties to the above-entitled actions that the time for filing the transcript or other record on appeal in each of said actions may be, and is, hereby extended to and including the 1st day of January, 1922.

Dated this 3d day of December, 1921.

_____

4443 _____

_____

Attorneys for Plaintiffs in Error.

_____

County Counsel,

_____

Chief Deputy;
Attorneys for Defendant in Error.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 668.

Rindge Company, a Corporation; May K. Rindge, Hueneme, Malibu & Southern Railway, a Corporation, and Hueneme, Malibu & Port Los Angeles Railway, a Corporation,
Plaintiffs in Error.

vs.

County of Los Angeles,
Defendant in Error.

Rindge Company (a corporation),
Plaintiff in Error,

vs.

County of Los Angeles,
Defendant in Error.

APPELLANTS' OPENING BRIEF.

The transcript in this case embraces two separate appeals, involving two separate condemnation actions numbered B 43572 and B 59443, respectively [Tr. fols. 1-119 and 553-571] which by stipulation of the parties and

order of court were tried at the same time, though not consolidated. [Tr. fol. 642.] The other case No. 65893, referred to in the stipulation, was decided in favor of the defendants and need not be further considered.

In the transcript and in the opinion of the District Court of Appeal, Second Appellate District, Division One, Action No. B 43572 is referred to as the "Main Road" case, and No. B 59443 as the "Alisos Canyon Road" case, and for the sake of conformity and clearness, we will adopt the same terminology in this brief. It was stipulated that all descriptions of the property sought to be condemned might be omitted in the printed transcript [Tr. fol. 633] and that only one bill of exceptions should be prepared and settled for both appeals. [Tr. fol. 638.] It was also stipulated that only one record need be printed and filed for hearing of the writs of error in said actions. [Tr. fol. 4439.]

On motion of the defendant in error, the trial court struck out from the amended answer of May K. Rindge the special defense which, in substance, alleged that the proposed roads were located entirely upon private property, were not a public necessity, and that the condemnation would be for private purposes and in contravention of the provisions of the Constitution of the United States, and particu-

larly in violation of the Fourteenth Amendment to said Constitution, and would be void and without due process of law, and constitute a denial to the defendants of the equal protection of the laws. [Tr. fols. 303-315.] The same defense was alleged in the amended answer of the Rindge Company and stricken out by the trial court, all of which was affirmed by the Appellate Court. In support of its case (No. B 43572), the defendant in error offered in evidence the resolution appearing in the complaint [Tr. fols. 9-48] in the Main Road case; and a similar resolution in the Alisos Canyon road case was introduced in evidence, identical in form to the one set out in the complaint in Action No. B 43572, referred to above. [Tr. fol. 679.]

The defendant in error thereupon rested, without any other evidence having been offered, and the plaintiffs in error made a motion for a nonsuit in each case on the ground that the defendant in error had failed to prove the facts which by section 1241 of the California Code of Civil Procedure must be made to appear before the defendant in error could condemn the property in question, and particularly upon the following four specific grounds, to-wit:

"First: That they have failed to prove that the taking is necessary to the use in question, namely, highway purposes;

Second: That they have failed to prove the public necessity of such proposed public utility or public improvement;

Third: That they have failed to prove that such property which it is proposed to be taken is necessary therefor;

Fourth: That they have failed to prove that such public utility or public improvement is planned or located in the manner which would be most compatible with the greatest public good and the least private injury." [Tr. fols. 681-3.]

Section 1241 of the California Code of Civil Procedure referred to in the motion for a nonsuit, then in force, was and is in words and figures as follows:

> "Before property can be taken, it must appear:
>
> "1. That the use to which it is to be applied is a use authorized by law;
>
> "2. That the taking is necessary to such use; provided, when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and

(c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, that said resolution ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, of property located outside of the territorial limits thereof.

"3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use, provided, that where such property has been so appropriated by any individual, firm or private corporation the use thereof for a public street or highway of a county, city and county, or any incorporated city or town, or the use thereof by a county, city and county, or any incorporated city or town, or a municipal water district for the same purposes to which it has been appropriated, or for any public purpose, shall be deemed a more necessary use than the public use to which such property has been already appropriated; and provided, further, that property of any character, whether already appropriated to public use or not, including all rights of any nature in water, owned by any person, firm or private corporation may be taken by a county, city and county, or any incorporated city or town or by a municipal water district, for the purpose of supplying water, or electricity for power, lighting or heating purposes to such county, city and county, or incorporated city or town, or municipal water district, or the inhabitants thereof, or for the purpose of supplying any other public utility,

or for any other public use. Any such taking may be made, either to furnish a separate and distinct supply of such water, and such electricity for power, lighting or heating purposes, or to provide for any such separate and distinct other public utility or other public use that may have been theretofore provided for or that may thereafter be provided for in so supplying or providing for such county, city and county, or incorporated city or town, or municipal water district or the inhabitants thereof; or in conjunction with any other supply or with any other public utility or other public use that may have been theretofore determined upon or that may thereafter be determined upon in accordance with law by the people of any such county, city and county, incorporated city or town or municipal water district. Nothing herein contained shall be construed as in any way limiting such rights as may be given by any other law of this state to counties, cities and counties, incorporated cities or towns or municipal water districts. But private property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal district, while such property is so appropriated and used for the public purposes for which it has been so appropriated."

The motions for a nonsuit were denied and this ruling of the trial court was affirmed by the Appellate Court. The trial court held that under section 1241 of the Code of Civil Pro-

cedure the resolutions were *prima facie* evidence of all the facts required by that section to *be* found, but the Appellate Court held that the trial court was mistaken in this view, holding that the section was *conclusive* evidence of those requisite facts, and hence that the trial court erred in favor of the plaintiffs in error, in holding that the resolutions were only *prima facie* evidence of the necessary facts recited in section 1241, C. C. P. [Tr. fols. 4277-8.]

The judgments of condemnation appealed from by the plaintiffs in error were affirmed by the District Court of Appeal, Second Appellate District, state of California, Division One, on June 11, 1921, and a petition by plaintiffs in error for a hearing by the Supreme Court of the state of California was denied on the 8th day of August, 1921 [Tr. fols. 4294-6], and final judgment by the said District Court of appeal was filed August 11, 1921, and the remittitur filed August 13, 1921. [Tr. fols. 4299-4302.] Thereupon the petition for a writ of error in the Main Road case was presented on October 5, 1921, and allowed on the same day, together with the assignment of errors and prayer for reversal. [Tr. fols. 4303-4361.]

The same procedure was followed with reference to the Alisos Canyon Road case, and substantially the same questions are involved. [Tr. fols. 4385-4432.] It will be noted that

the Main Road case is numbered 3533 in the said District Court of Appeal, and the Alisos Canyon Road case is numbered 3533½. [Tr. fols. 4243-4247.] The record herein referred to involves the following questions:

1. Was the property sought to be condemned for a use authorized by law, and was the taking necessary to such use?

2. Was there any public necessity for the proposed highways, in view of the fact that they were located exclusively upon private property?

3. Were the resolutions adopted by the Board of Supervisors of Los Angeles county conclusive evidence of the facts required to be found by section 1241 of the California Code of Civil Procedure, before a citizen's property may be condemned, and is the proviso of that section constitutional?

4. Was the trial court justified in holding that the resolutions, adopted by the Board of Supervisors of Los Angeles county, were only *prima facie* evidence of the facts required to be found by section 1241 of California Code of Civil Procedure, and that the burden was cast upon plaintiffs in error to negative this *prima facie* showing by clear and convincing evidence?

5. Were plaintiffs in error deprived of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, or have they or either of them been denied the equal protection of the laws, in violation of the said amendment?

Specifications of Errors Relied Upon.

The plaintiffs in error rely upon the following errors as set forth in their assignment of errors heretofore filed in Action No. 3533 [Tr. fols. 4311-4359] as follows, to-wit:

"I.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding against the contention of the plaintiffs in error that the taking of the property involved in said suit for an alleged public road and highway and sought therein to be condemned for such purposes was necessary for a public use, and that it could under any circumstances afford any accommodation of any kind or character to the traveling public or any part or portion of such traveling public, or that, therefore, the taking of the same for highway purposes would not be without due process of law and would not be in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and that the taking of said property under the resolution in said suit for public highway or other purposes would not be void and would not be a denial to the plaintiffs in error of equal protection of the laws under the Constitution of the United States and would not

contravene the Fourteenth Amendment to the said Constitution of the United States.

II.

That the said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the ruling of the lower court in striking out the second, further and separate answer and defense of the defendant, May K. Rindge, in her amended answer in the above-entitled cause, which was and is in the words and figures following, to-wit:

'And for another and further and separate answer and defense this defendant alleges:

I.

That all of the properties described in paragraphs II and VI of the complaint and in any way involved in this action are entirely upon and within the boundaries of that certain ranch situate in the county of Los Angeles, state of California, commonly known as the Malibu Ranch.

II.

That while a portion of said Malibu Ranch is owned by the defendant, May K. Rindge, and the remaining portion thereof by the defendant Rindge Company, the said ranch as a whole is now, and was at the commencement of this action, and for more than twenty years prior thereto had been treated, operated, managed and controlled as a single ranch under one joint management and control; and has at no time ever been severed or segregated into parts or parcels or treated or handled or managed by the owners thereof as other than a single ranch and holding.

III.

That said method of holding, managing and controlling said ranch by its said two owners has at all times been known to the plaintiff and to the public in general.

IV.

That said Malibu Ranch as such and under that name and designation and as embraced in the original purchase of the same by the defendant, May K. Rindge, and the predecessor in interest of the defendant, Rindge Company, at the point where the proposed road sought to be condemned herein terminates, at the westerly end of said road, ends at and upon the boundary line between the counties of Los Angeles and Ventura, state of California; but that the defendant, Rindge Company, is the owner and in the possession of, and was at the date of the commencement of this action, the owner and in the possession of property immediately adjacent thereto in the said county of Ventura and forming a continuation into said county of Ventura for a distance of about 1¼ miles of the said ranch under the said joint management and control of the said defendants, May K. Rindge and Rindge Company.

V.

That there was not at the commencement of this action and is not now in the said county of Ventura at any point either contiguous to or upon any part or portion of said property of the Rindge Company or within ten miles of the western, that is to say, the Ventura county, end of said ranch, any public road of any kind or character whatever; and that said ranch can be reached from said end only and wholly by private trails and ways.

VI.

That there was not at the commencement of this action, and is not now, any public road or way of any kind or character either upon that portion of said Malibu Ranch located in Los Angeles county or upon that extension of the same in Ventura county; and that the said pro-

posed road or highway sought to be condemned and taken in this action would, if condemned and taken, be located wholly and solely upon that portion of the Malibu Ranch situated in Los Angeles county, would end and terminate upon the private property of the defendant, Rindge Company, at the Ventura county line; would have no laterals or outlets or feeders of any kind or character; would be located wholly and solely upon, and give access wholly and solely to, the private ranch property of the defendants, May K. Rindge and Rindge Company; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel.

VII.

That neither of said defendants, owners of and jointly managing and controlling said Malibu Ranch as a whole, has any need or desire for said or any public road upon said ranch or upon any part or portion thereof; but that, on the contrary, any such public road would be a constant and continuous menace and damage to their said ranch property, and would largely destroy its value as a unit for ranch purposes; and would be and constitute a continual nuisance; and expense to the said defendants.

VIII.

That by reason of the premises the taking of any part or portion of said property as contemplated by the plaintiff and as prayed for in the complaint for road or highway purposes would be without necessity of any kind or right, and in contravention of the provisions of the Constitution of the United States, and particularly in violation of the Fourteenth Amendment to said Constitution, and would be void and without due process of law, and constitute a denial to the defendants, May K. Rindge and

the Rindge Company, of the equal protection of the laws under the Constitution of the United States, and would contravene the said Fourteenth Amendment to said Constitution.'

III.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the ruling of the lower court in striking out the third separate answer and defense of the defendant, Rindge Company, in the above entitled cause, which was and is in the words and figures following, to-wit:

'I.

That all of the properties described in paragraphs II and VI of the complaint and in any way involved in this action are entirely upon and within the boundaries of that certain ranch situate in the county of Los Angeles, state of California, commonly known as the Malibu Ranch.

II.

That while a portion of said Malibu Ranch is owned by the defendant, May K. Rindge, and the remaining portion thereof by the defendant Rindge Company, the said ranch as a whole is now, and was at the commencement of this action, and for more than twenty years prior thereto had been, treated, operated, managed and controlled as a single ranch under one joint management and control; and has at no time ever been severed or segregated into parts or parcels or treated or handled or managed by the owners thereof as other than a single ranch and holding.

III.

That said method of holding, managing and controlling said ranch by its said two owners has at all times been known to the plaintiff and to the public in general.

IV.

That said Malibu Ranch as such and under that name and designation and as embraced in the original purchase of the same by the defendant May K. Rindge, and the predecessor in interest of the defendant Rindge Company, at the point where the proposed road sought to be condemned herein terminates at the westerly end of said road, ends at and upon the boundary line between the counties of Los Angeles and Ventura, state of California; but that the defendant Rindge Company is the owner and in the possession of, and was at the date of the commencement of this action, the owner and in the possession of property immediately adjacent thereto in the said county of Ventura, and forming a continuation into said county of Ventura for a distance of about 1¾ miles of the said ranch under the said joint management and control of the said defendants, May K. Rindge and Rindge Company.

V.

That there was not at the commencement of this action and is not now in the said county of Ventura at any point either contiguous to or upon any part or portion of said property of the Rindge Company, or within ten miles of the western, that is to say, the Ventura county, end of said ranch any public road of any kind or character whatever; and the said ranch can be reached from said end only and wholly by private trails and ways.

VI.

That there was not at the commencement of this action, and is not now, any public road or way of any kind or character either upon that portion of said Malibu Ranch located in Los Angeles county, or upon that extension of the said ranch in Ventura county; and that the said proposed road or highway sought to be

condemned and taken in this action would, if condemned and taken be located wholly and solely upon that portion of said Malibu Ranch situated in Los Angeles county, would end and terminate upon the private property of the defendant Rindge Company at the Ventura county line; would have no laterals or outlets or feeders of any kind or character; would be located wholly and solely upon and give access wholly and solely to, the private ranch property of the defendants May K. Rindge and Rindge Company; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel.

VII.

That neither of said defendants owners of and jointly managing and controlling said Malibu Ranch as a whole, has any need or desire for said or any public road upon said ranch or upon any part or portion thereof; but that, on the contrary, any such public road would be a constant and continuous menace and damage to their said ranch property, and would largely destroy its value as a unit for ranch purposes; and would be and constitute a continual nuisance and expense to the said defendants.

VIII.

That by reason of the premises the taking of any part or portion of said property as contemplated by the plaintiff and as prayed for in the complaint for road or highway purposes would be without necessity of any kind or right, and in contravention of the provisions of the Constitution of the United States, and particularly in violation of the Fourteenth Amendment to said Constitution and would be void and without due process of law, and constitute a denial to the defendants May K. Rindge and Rindge Company of the equal pro-

tection of the laws under the Constitution of the United States, and would contravene the said Fourteenth Amendment to said Constitution.'

IV.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the ruling of the lower court against the said above-quoted third and separate answer and defense of the defendant Rindge Company in the above-entitled cause.

V.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding that the following provisions of Sec. 1241 of the Code of Civil Procedure of the state of California, in force at all times during the pendency of the proceedings involved in the above-entitled cause, to-wit:

'Provided, when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury'

were and are constitutional, and were not in violation of the provisions of the Federal Constitution prohibiting the taking of property without due process of law, and were not violative of the Fourteenth Amendment to the Constitution of the United States, and were not obnoxious to any provision of the state or federal Constitution, and in particular that portion thereof which prescribes that such resolution referred to in said Sec. 1241 of the said Code of Civil Procedure if passed by a vote of two-thirds of all of the members of any such legislative body shall be conclusive evidence of the various matters and things set forth and prescribed in said section as necessary to appear before property can be taken by condemnation.

VI.

Said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the county of Los Angeles, was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deprive these plaintiffs in error of their property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

VII.

Said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the county of Los Angeles, the defendant in error, was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deny to these plaintiffs in error the equal protection of the law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

VIII.

That the said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the property of these plaintiffs in error was not in and by the necessary force, and effect of the judgment of the Superior Court of the state of California in said cause taken for public use without due process of law contrary to the provisions of the Constitution of the United States, and particularly to the provisions of the Fourteenth Amendment thereto.

IX.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following finding of fact by the lower court in the above-entitled cause:

'That it is necessary for highway purposes and the public interest, convenience and necessity require, the acquisition of an easement in and over the properties particularly described in paragraph II of the said complaint for the construction, establishment and maintenance of a public highway, as prayed in said complaint, and that the use to which the property sought to be taken is to be applied, is a use authorized by law.'

X.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following finding of fact by the lower court in the above-entitled cause:

'That it is not true that there has been no consideration or determination of the Board of Supervisors of the county of Los Angeles of any of the matters or things alleged in said complaint, and particularly of the matters or

things alleged in said complaint, and particularly of the matters or things alleged in paragraph II of said complaint, nor is it true that the resolution referred to in paragraph II of said complaint was arbitrarily adopted by said Board of Supervisors, without any consideration of the matters or things therein contained or without the exercise of any discretion therein, or well knowing that there was no room for the exercise of any discretion therein, or that it was arbitrarily adopted at all, nor is it true that said resolution was adopted by said Board of Supervisors knowing full well, or otherwise, that all, or that any of the property proposed to be taken for public road and highway, and to be condemned as in said resolution set forth and as in the complaint alleged, was not, and could not be necessary for any public use of any kind or character whatever and cannot under any circumstances, afford any accommodation of any kind or character to the traveling public, or any part or portion thereof, and that the taking of same for said highway purposes would be without due process of law or in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, or that the taking of said property under said resolution for public highway or other purposes, would be void, or would be a denial to the defendants, or to any or either of them, of the equal protection of the laws under the Constitution of the United States, and would contravene the Fourteenth, or any amendment to said Constitution, and in this behalf the court finds that it is true that the property proposed to be taken for public road and highway, and sought to be condemned herein, is located wholly and solely upon and within the confines of private property, except that the easterly end of the strip of land sought to be

taken terminates at, and will be in continuation of, a public highway now, and prior to the commencement of this action, existing; and the court further finds that the highway sought to be established and maintained over and upon the land sought to be taken, and for the purpose of which the taking is sought, will afford accommodation to the traveling public.'

XI.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause:

'That it is necessary for highway purposes, and the public interest, convenience and necessity require, the acquisition of an easement in and over the property particularly described in the amended complaint in paragraph number II thereof, for the construction, establishment and maintenance of a public highway.'

XII.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause.

'That the use to which the property sought to be taken is to be applied, is a use, authorized by law.'

XIII.

That the property of the plaintiffs in error sought to be condemned in this action and included in the judgment of condemnation for alleged highway purposes consists of a strip of land forty feet in width running for a length of about twenty-one miles into and exclusively upon the real property in Los Angeles county, California, owned and operated in common by the Rindge Company, a corporation, and May K. Rindge, two of the above named petitioners,

and one hundred and forty-nine additional parcels adjoining and contiguous to said forty-foot strip and all upon and within the exterior boundaries of said lands of said petitioners, Rindge Company and May K. Rindge.

The plaintiffs in error also rely upon the following errors as set forth in their assignment of errors heretofore filed in action No. 3533½ [Tr. fols. 4392-4412] as follows:

I.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the finding in the above entitled cause that the following allegation of paragraph II of the complaint in said cause was true, to-wit:

'That the public interest and necessity require the construction of a public highway over the property hereinafter described,' namely: the property described in said complaint and condemned in said action.

II.

That the said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the finding in the above entitled cause that the following allegation of paragraph II of the complaint in said cause was true, to-wit:

'That for the purpose of constructing a public highway the acquisition of said property is necessary, namely: that certain parcel of land situate in the county of Los Angeles, and described as being,' describing the property condemned in said action.

III.

That said District Court of Appeal of the state of California, Second Appellate District, Division, One, erred in sustaining the follow-

ing finding of the trial court in the above-entitled cause, to-wit:

'That it is not true that there has been no consideration or determination by the Board of Supervisors of the county of Los Angeles of any of the matters or things alleged in said complaint, and particularly of the matters or things alleged in paragraph IV of said complaint, nor is it true that the resolution referred to in paragraph IV of said complaint was arbitrarily adopted by said Board of Supervisors, without any consideration of the matters or things therein contained, or without the exercise of any discretion therein, or well knowing that there was no room for the exercise of any discretion therein, or that it was arbitrarily adopted at all, nor is it true that said resolution was adopted by said Board of Supervisors knowing full well, or otherwise, or at all, that any of the property proposed to be taken for a public road and highway, and to be condemned, as in said resolution set forth and as in complaint alleged, was not, and could not be necessary for any public use of any kind or character whatever, and cannot, under any circumstances, afford any accommodation of any kind or character to the traveling public, or any part or portion thereof, and that the taking of same for said highway purposes would be without due process of law or in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, or that the taking of said property under said resolution for public highway or other purposes, would be void, or would be a denial to the defendant, of the equal protection of the laws under the Constitution of the United States, and would contravene the Fourteenth or any amendment to said Constitution, and in this behalf the court finds; that it is true that

the property proposed to be taken for a public road and highway, and sought to be condemned herein, is located wholly and solely upon and within the confines of private property, except that the southerly end of the strip of land sought to be taken terminates at, and will connect with, another strip of land sought to be acquired by the plaintiff in another action (which other action was tried at the same time as, and with this action, and before the same court and jury) brought for the purpose of condemning said last mentioned strip of land for public highway purposes, and the court further finds that the highways sought to be established and maintained over and upon the land sought in this action to be taken and for the purpose of which the taking is sought, will afford accommodation to the traveling public.'

IV.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause, to-wit:

'That it is necessary for highway purposes, and the public interest, convenience and necessity require, the acquisition of an easement in and over the property particularly described in the amended complaint in paragraph number II thereof, for the construction, establishment and maintenance of a public highway.'

V.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause, to-wit:

'That the use to which the property sought to be taken is to be applied, is a use authorized by law.'

VI.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding that the following provisions of Sec. 1241 of the Code of Civil Procedure of the state of California, in force at all times during the pendency of the proceedings involved in the above-entitled cause, to-wit:

'Provided, when the legislative body of a county, city and county or an incorporated city or town, shall by resolution or ordinance, adopted by vote of two-thirds of all its members have found and determined that the public interests and necessity require the acquisition, construction or completion, by such county, city and county or incorporated city or town, any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance shall be conclusive evidence: (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury,' were and are constitutional, and were not in violation of the provisions of the Federal Constitution prohibiting the taking of property without due process of law, and were not violative of the Fourteenth Amendment to the Constitution of the United States, and were not obnoxious to any provision of the State or Federal Constitution, and in particular that portion thereof which prescribes that such resolution referred to in said Sec. 1241 of the said Code of Civil Procedure if passed by a vote of two-thirds of all of the members of such a legislative body shall be conclusive evidence

of the various matters and things set forth and prescribed in said action as necessary to appear before property can be taken by condemnation.

VII.

Said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the county of Los Angeles was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deprive these plaintiffs in error of their property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

VIII.

Said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the county of Los Angeles, the defendant in error, was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deny to these plaintiffs in error the equal protection of the law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

IX.

That the said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the property of these plaintiffs in error was not in and by necessary force and effect of the judgment of the Superior Court of the state of California in said cause taken for public use without due process of law contrary to the provisions of the Constitution of the United States, and particularly to the provisions of the Fourteenth Amendment thereto."

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ARGUMENT.

I.

The Special Defenses Stricken Out Raised the Question Whether the Land Sought to Be Condemned Was Being Taken for a Public Use, Authorized by Law.

The first two questions stated as being involved upon this appeal are raised by the order of the court striking out the special defenses in the amended answers of the defendants, May K. Rindge, and the Rindge Company. That portion of the amended answer of May K. Rindge, stricken out, appears in the statement, *supra.*

The amended answer of the Rindge Company contained a special defense "in the same identical words and figures" as the above, and it was also stricken out by the court on motion of the defendant in error. [Tr. fols. 642-658.]

This special defense was pleaded upon the theory that an isolated road, wholly within the boundaries of what is practically one property, which is not necessary for the use of, and not only not desired by but strenuously opposed by, the owners of such property, and that could and would afford no real or genuine service to any part of the public for road purposes in any true sense of such purposes, could

not possibly be a public necessity for which condemnation would lie.

It is our firm belief that this defense, if substantiated (and for the purpose of the motion to strike, it had to be accepted as true), would justify the application of the sound doctrine, well recognized but seldom invoked, that private property cannot be taken under the guise or upon pretence of necessity for a public use where demonstrably it would not and could not subserve any such use. Under such circumstances the taking of such property would not constitute "the exercise of 'legal legislative [or judicial] discretion;'" for the fact of the impossibility of its being necessary for a public use under the established conditions would leave no room for the exercise of any discretion, and therefore such taking would merely be power "arbitrarily exerted."

> Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478, 485, 60 L. Ed. 392 citing—
>
> Houck v. Little River Drainage Dist., 239 U. S. 254, 60 L. Ed. 266;
>
> Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 269.

In Myles v. Drainage Dist., *supra,* an assessment district for drainage purposes and to prevent lands from being overflowed was formed, embracing a tract of land owned by the plain-

tiff, which was elevated property. It was land situated above the overflow of waters, and was not susceptible of being drained by any plan of improvement which was formed and adopted, nor by any plan which might have been adopted.

There the proceedings were clothed with all of the forms of law, hearings were provided for, and it was proposed to assess only lands which were susceptible of being drained or prevented from being overflowed, or otherwise improved by the plan or scheme of improvement, and yet the result of the proceedings was that elevated lands of the plaintiff, situated in altitude high above the water and not susceptible of being drained and prevented from being overflowed and lands of high value, were assessed according to their value for the sole benefit of other owners, whose lands were in fact overflowed or damaged by waters.

The Supreme Court said:

> "It is said that 'under the law of Louisiana the action of the legislative body (the Police Jury), in the exercise of its discretion in a drainage district, will not be inquired into by the court, except upon a special averment of fraud which is not pleaded.' And such decision, it is further contended, was a decision upon the state law and presents no federal question, the statute of the state not being attacked.
>
> "We cannot concur in the contention. It is true the law of the state as written is not attacked, but the law as administered

and justified by the Supreme Court of the state is attacked and it asserted to be a violation of the Constitution of the United States. The question presented is federal and the motion to dismiss is denied. And the considerations that move a denial of the motion move a decision of the merits of the question.

"The charge is the plaintiff's property was included in the district not in the exercise of 'legal legislative discretion,' not that the scheme of drainage would inure to the benefit of the property, even indirectly, but with the predetermined 'purpose of deriving revenues to the end of granting a special benefit to the other lands subject to be improved by drainage, without any benefit' to plaintiff 'or its property whatever,' present or prospective.

"Nothing could be more arbitrary if drainage alone be regarded."

(Op., p. 484.)

And again:

"We are not dealing with motives alone but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property but solely of the improvement of the property of others — power, therefore, arbitrarily exerted imposing a burden without a compensating advantage of any kind."

(Op., p. 485.)

So here, if the allegations of these special defenses were true, and for the purpose of the

motion they were true, there would be no possible room for the exercise of legislative or judicial discretion in the premises; for the contemplated road could serve no useful or necessary purpose to any part of the public whatever.

Even the fact that it might be scenically desirable (and there is no evidence in the record to support that presumption) presents no ground for striking out this defense. That contention might have been urged and attempted proof of its scenic value might have been offered in rebuttal of this defense, and an issue upon it thus have been raised. But the lower court had no legal right to arbitrarily assume upon the motion to strike that any such answer to the special defense pleaded would be urged or could have been successfully proven.

In other words, our special defenses tendered the issue that there was no public necessity to be served by reason of the special facts pleaded; and the trial court arbitrarily decided, in effect that, even if the facts pleaded showed the absolute want of any public necessity, and therefore eliminated any possible exercise of discretion as to that vital matter, nevertheless such demonstrated want of necessity was no defense to the action.

In the case of Kansas City v. Hyde, 196 Mo. 498, 96 S. W. 201, 113 Am. St. Rep. 766, the court said:

> "To the City Council the state has delegated the power to condemn land for a public use, it has no power to condemn for a private use; 'public' in that connection means everybody; if the use is not for everybody, it is a private use; if to an individual, or to any number of individuals, is given the right to use the property in such manner as will practically exclude the general public, it is a giving of the property to private use and a destruction of its public service character."

The special defenses stricken out show that the roads condemned were entirely upon private property and terminated upon the private property of certain of the plaintiffs in error with no contiguous roads of any kind whatsoever; that the Malibu Ranch where the road terminated at the westerly end "can be reached from said end only and wholly by private trails and ways"; that the said "proposed road or highway sought to be condemned and taken in this action would if condemned and taken, be located wholly and solely upon that portion of the said Malibu Ranch situated in Los Angeles county, would end and terminate upon the private property of the defendant, Rindge Company, at the Ventura county line; would have no laterals or outlets or feeders of any

kind or character; would be located wholly and solely upon, and give access wholly and solely to, the private ranch property of the defendants, May K. Rindge and Rindge Company; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel."

This portion of the special defense brings the case at bar within the principle announced in the quotation from the case last cited, for certainly the general public will be *"practically excluded" from a highway which commences and ends upon private property, without "laterals or outlets or feeders of any kind or character."*

We submit, therefore, that the two first questions stated in our brief should be answered in the negative, and if so, the judgments of condemnation should be reversed.

II.

The Amendment of 1913 to Section 1241 of the California Code of Civil Procedure, Declaring Certain Resolutions to Be Conclusive Evidence of the Facts Stated, Was and Is Unconstitutional and Void.

The third question involves the validity of the proviso to subdivision 2 of section 1241 of the California Code of Civil Procedure, and the

effect of said section in a condemnation proceeding.

There are certain matters which the law requires the county to establish—which "must appear"—"before property can be taken."

These are enumerated in section 1241 of the Code of Civil Procedure. They are:

> "1. That the use to which it is to be applied is a use authorized by law.
> "2. That the taking is necessary to such use," which involves,
> "(a) 'The public necessity' of the proposed improvement;
> "(b) That the property sought to be taken is necessary therefor'; and
> "(c) That the improvement is planned or located in the manner which will be the most compatible with the greatest public good and the least private injury.
> "3. If already appropriated to some public use, that the public use to which it is to be applied, 'is a more necessary public use.'"

The following proviso was incorporated in section 1241, C. C. P., by an amendment of 1913:

> "Provided, when the legislative body of a county, city and county, or incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by said county, city and county, or incorporated city or town, of any proposed public utility or of a public improvement,

and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence:

"(a) Of the public necessity of such proposed public utility or public improvement;

"(b) That such property is necessary therefor; and

"(c) That such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest good and the least private injury; provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, of property located outside of the territorial limits thereof."

California Stats. 1913, p. 549.

Section 1242 of the California Code of Civil Procedure then and now reads as follows:

"In all cases where land is required for public use, the state, or its agents, in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of section twelve hundred and forty-seven. The state, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantoness, or malice."

We contended, at the trial, that if the road laws of this state contemplated the institution of condemnation proceedings by any such *ex parte* resolution of the board of supervisors as that which forms the sole basis of this action, and further contended that if the foregoing *proviso* applied to such a resolution, then the proviso would be unconstitutional as attempting to authorize the taking of property without due process of law, no hearing of any sort being provided for or accorded to the property owners in the premises.

Under such circumstances, all of the vital questions essential to the taking of private property for public use, except only the one question of the amount of damages to be awarded for such taking, could be arbitrarily and conclusively determined by a two-thirds vote of the supervisors without any notice whatever to the land owner and without any opportunity whatever on his part to be heard.

The trial court sustained the contention of plaintiffs in error that this proviso would be unconstitutional if given the construction its language imports, but also reached the unwarranted conclusion that the resolutions did, without other proof, establish *prima facie* the facts required to be found by said section 1241. But the Appellate Court, as we have pointed out, disagreed with the trial court on this point, and

held that the Code section meant what it said and was valid; and for that reason, refused to review the evidence introduced in pursuance of the ruling of the trial court on the question of necessity. [Tr. fols. 4266-4282.]

The validity of the Amendment of 1913 to this code section 1241, therefore, is clearly presented by the record in the case at bar, and we will now discuss it. The proviso appearing in subdivision 2 of section 1241, C. C. P., was an amendment enacted by the Legislature in the year 1913. (California Statutes and Amendments 1913, p. 549.)

Prior to the amendment of section 1241 C. C. P., Subd. 2, by Statutes of 1913, page 549 (effective August 10th, 1913, the necessity or expediency of taking private property for a public use was subject to judicial inquiry.

Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 676, etc.;
Lindsay I. Co. v. Mehrtens, 97 Cal. 676;
Vallejo etc. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 561;

Assuming, therefore, that prior to 1913, the court was authorized to inquire into the question of whether or not the taking was necessary to such public use, what effect did the amendment to subdivision 2 (adding the proviso) have? This proviso reads as above indicated.

Section 1 of article VI of the California Constitution reads as follows:

> "The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, Superior Courts and such inferior courts as the Legislature may establish in any incorporated city or town, township, county, or city and county."

By the express terms of section 1241 C. C. P., it is made necessary for the facts therein recited to appear "before property can be taken." Must appear to whom? Obviously to the court in which the condemnation suit is being tried. But this amendment assumes to deprive the court of the judicial function of determining these necessary facts, upon evidence admitted upon the trial, of the character and weight sufficient to satisfy the judicial mind, by declaring that if the legislative body referred to adopts the resolution in a certain manner, the production of the resolution shall be conclusive evidence of the said necessary facts.

As was said in Bacon v. Bacon, 150 Cal. 477, at page 484:

> "The Legislature does not possess power to divest the court of its constitutional jurisdiction. It may change the practice or procedure, the mere method by which the jurisdiction is exercised * * * but it cannot take away the jurisdiction entirely, nor substantially impair it."

In San Jose Ranch Co. v. San Jose etc. Co., 126 Cal. 322, the court, at page 326, said:

> "It is the right of every person, before he can be deprived of his property, to have a trial according to law, to have the same character of trial, governed *by the same established rules of evidence and procedure* as are applied in other cases under similar conditions." (Italics ours.)

By the proviso now under discussion the Legislature attempted to deprive the appellants and all other defendants in similar condemnation suits of this valuable right, by declaring that the courts *must hold* that the mere production of a resolution adopted by the body corporate, seeking the condemnation of certain property, is conclusive evidence of the essential facts that must appear before the "property can be taken." It seems to us that the mere statement of this proposition is sufficient to demonstrate its unconstitutionality, for as was again said in the case last cited:

> "Uniformity in the administration of justice is a fundamental right, and every litigant may demand that his case shall be tried, so far as practicable, by the same established rules of procedure and evidence as well as upon the same principles which are applied to other like controversies."

In the case of Ennis-Brown v. Central Pac. Ry. Co. *et al.*, 235 Fed. 825, Judge Ross, in de-

livering the opinion of the Circuit Court of Appeals, said:

> "The court in such a case *must determine* whether the use to which it is sought to subject the property is one authorized by law and *that the taking is necessary to such use* (C. C. P., Sec. 1241), *which essentially includes the right to determine to what extent the proposed taking is necessary*—the precise question which plaintiff presents by the present bill." (Italics ours.)

It will be noted that both of these opinions were filed after the amendment to Sec. 1241 C. C. P. in the year 1913, and the inference is that the learned judges who delivered those opinions were of the opinion that the necessity for the taking of private property for a public use is still a judicial question to be determined by the court upon the evidence introduced in each particular case. We contend that any law that would prevent a party from showing that his property was being taken without necessity and for a private purpose would be equivalent to legislative confiscation and void. It is not competent for the Legislature to make certain acts conclusive evidence when the ultimate result would be to take property of a citizen without necessity and without any opportunity to be heard.

In R. C. L., Vol. 10, page 864, the author says:

> "But a law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would be substantially to deprive him of due process of law."

In Board of Com. etc. of Auburn v. Merchant, 106 N. Y. 143, 57 Am. Rep. 705, the court upheld a law declaring certain facts to be *prima facie* evidence of the violation of a criminal statute and in the course of the opinion points out the difference between such a law and one declaring certain facts to be *conclusive evidence,* thereby depriving a party of the right to be heard. The court said:

> "The rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are, at all times, subject to modification and control by the Legislature * * *. It may be conceded, for all the purposes of this appeal, that a law that should make evidence conclusive which was not so necessarily in and of itself, and thus preclude the adverse party from showing the truth, would be void, as indirectly working a confiscation of property or a destruction of vested rights. But such is not the effect of declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact to be established, leaving the adverse party at liberty to rebut and overcome it by contradictory and better evidence."

It has been held that the Legislature has no power to make tax deeds *conclusive evidence of any jurisdictional fact, or fact vital to the exercise of the power of taxation or sale, divesting the title of property for the nonpayment of taxes.*

10 R. C. L. p. 867, sections 8-9;
Larson v. Dickey, 39 Neb. 463, 58 N. W. 167, 42 A. S. R. 595.

In the last case cited the court said:

> "The constitution of this state has not committed to the Legislature the power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale divesting the title of the citizens' property for the nonpayment of taxes. Such determination belongs to the judiciary."

In a note to People v. Cannon (139 N. Y. 32), 36 Am. St. Rep. 668, the author, at page 683, says:

> "It may be conceded for all the purposes of this power *that a law that should make evidence conclusive which was not so necessarily in and of itself and thus preclude the adverse party from showing the truth, would be void as indirectly working a confiscation of property or a destruction of vested rights.*"

And this note furnishes many illustrations showing that it is only competent for the Legislature to declare a tax deed conclusive evidence

of unessential procedure which might have been dispensed with, originally, but not of an essential fact so indispensable "that without its performance no tax can be raised." In such a case that fact can not be dispensed with by legislative fiat so as to prevent the owner from showing the truth.

In Allen v. Armstrong, 16 Iowa 513, the rule as quoted in the note referred to is stated as follows:

> "The true rule on the subject seems to be that the Legislature may make a tax deed conclusive evidence of the regularity of the prior proceedings as to all nonessentials or matters of routine which rest in mere expediency—acts which need not have been required in the first place, as an affidavit of the sheriff to the delinquent list—and which the Legislature may, by a curative act, excuse when omitted. But the owner of property can not be precluded from showing the invalidity of a tax deed thereto by proving the omission of any act essential to the due assessment of the same, or levy of the taxes thereon and sale thereof on that account. As to the performance of these acts and the facts necessary to constitute them, the deed can only be made *prima facie* evidence."

Again it is said at page 689 of the note:

> "In civil cases, though we have met no direct adjudication on the subject, we think it safe to assert that where a party would be able to establish his cause of action and

of defense, were he permitted to prove the truth, and such cause or defense does not consist of a mere irregularity or technicality, *he cannot be precluded from offering such proof by a statute creating a conclusive presumption against him.*"

In the case of L. R. etc. R. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55, the court said:

"It is not within the province of the Legislature to divest rights by prescribing to the courts what should be conclusive evidence. This matter was fully considered by this court in the case of Cairo v. Fulton R. R. Co. v. Parks, 32 Ark. 131, which arose under a statute, which endeavored to make a county clerk's deed of lands, sold for taxes, conclusive of its recitals against the true owner. Justice Walker, in delivering the opinion, remarked: 'The Legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false; at all events, if such facts are necessary to show that the substantial rights of property are to be affected, and he is made to lose his property.' Railroad companies have the right to run their trains, and the consequent right of being protected in doing so, unless damage to others should result from some negligence, want of due care, or culpable neglect of reasonable precautions, imposed by the legislative power. It affects their substantial rights of property to be able to show the facts, and they cannot be constitutionally deprived of the power."

In Hammond v. State of Ohio, 84 N. E. 416, 125 A. S. R. 684, 15 L. R. A. (N. S.) 906, the same principle was applied to a criminal case.

In a note to the same case appearing in Ann. Cases, Vol. 14, page 734, it is said:

> "There is, of course, a vast difference between the power of the Legislature to declare that proof of certain facts shall constitute *prima facie* evidence and *its power to declare that certain evidence shall be conclusive.* It should be observed, however, that, as recognized by Mr. Wigmore, statutes which make certain evidence conclusive, generally change, not the rules of evidence, but the substantive law * * *. It has been said that closing the mouth of a person when he comes into court has the same effect as depriving him of his day in court to vindicate his rights. A statutory provision to the effect that the certificate of the state weighmaster as to the weight of grain shall be conclusive upon all the parties has accordingly been held to be unconstitutional. (Vega Steamship Co. v. Consolidated Elevator Co., 75 Minn. 309, 77 N. W. 973, 74 Am. St. Rep. 484.) Language to the effect that a statute providing that certain evidence shall be conclusive is unconstitutional, may also be found in a number of cases. (See State v. Thomas, 144 Ala. 77, 6 Ann. Cas. 744, 40 So. 271; Jacques etc. Co. v. Carstarphen Warehouse Co., 131 Ga. 1, 62 S. E. 82; Pittsfield etc. R. Co. v. Harrison, 16 Ill. 81; People v. Rose, 207 Ill. 361, 69 N. E. 762; Wantlan v. White, 19 Ind. 470; Voght v. State, 124 Ind. 358, 24 N. E. 680; State v. Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145,

36 L. R. A. 179; Allen v. Armstrong, 16 Ia. 508; Howard v. Moot, 64 N. Y. 262.) And it has been held that the legislature has no power to provide that the fact in issue may be conclusively proved by the oath of the complainant. (Savannah etc. R. Co. v. Geiger, 21 Fla. 669, 58 Am. Rep. 697; Ely v. Thompson, 3 A. K. Marsh (Ky.) 73.)"

The rule is thus stated by the author of Cyc., Vol. 8, pages 820-1:

> "The Legislature has power to give greater effect to evidence than it possesses at common law and in both civil and criminal proceedings it may declare what shall be *prima facie* evidence. *On the other hand it cannot prescribe what shall be conclusive evidence, as this would be an invasion of the province of the judiciary.*"

After quoting the rule the court in State v. Jim Thomas, 144 Ala. 77, 6 Ann. Cases, 745, says:

> "This seems to be a rule of well nigh, if not universal recognition."

In 2 Wigmore on Ev., Sec. 1353, page 1666, that learned author states the rule and the reason for it as follows:

> "To this question the answer can hardly be doubtful. It is one thing for the judiciary, while exercising in its own way its constitutional powers, to choose to accept the aid of an official certificate in reaching its determination; but it is quite a different thing for the judiciary to be forbidden alto-

gether to exercise its powers in a certain class of cases. The judicial function under the Constitution is to apply the law; to apply the law necessarily involves the determination of the facts; and to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. To make a rule of conclusive evidence, compulsory upon the judiciary, is to attempt an infringement upon their exclusive province."

He cites in the note, J. Nisbet, in Bordsong v. Brooks, 7 Ga. 88, 92, who said:

"The Legislature has no power to legislate the truth of facts, whether facts upon which rights depend are true or false is an inquiry for the courts to make, under legal forms. It belongs to the judicial department of the government."

In applying this principle to tax deeds the U. S. Supreme Court, in Marx v. Hanthorne, 148 U. S. 172, 37 L. Ed. 410, said:

"Without going at length into the discussion of a subject so often considered, we think the conclusion reached by the courts generally may be stated as follows: 'It is competent for the Legislature to declare that a tax deed shall be *prima facie* evidence not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but that the Legislature cannot deprive one of his property by making his adversary claim to it, whatever that claim may be, conclusive of its own valid-

ity, and it cannot, therefore, make the tax deed *conclusive* evidence of the holder's title to the land.' "

The same distinction between the power of the Legislature to declare certain facts to be *prima facie* evidence of an ultimate fact or conclusion and to make the same facts conclusive evidence, is noted in the California cases.

See:

Clarke v. Mead, 102 Cal. 516, 519.

The defendants were brought into court by the county of Los Angeles in an action seeking to condemn their property, and these defendants, the plaintiffs in error herein, were entitled to prove any facts tending to show that, under existing law, the county was not entitled to the relief sought. The law did not provide for any hearing before the Board of Supervisors on these vital questions, and it was not competent for the California Legislature to say that the resolutions adopted *ex parte*, and without any opportunity to be heard, should, when the defendants appeared in court, also prevent them from disproving the allegations of the complaint.

In Larson v. Dickey, 39 Neb. 463, 42 A. S. Rep. 595, 606, this principle was clearly stated as follows:

"Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity, when in court, to establish any fact, which, according to the usages of common law or provisions of the constitution, would be a protection to his property: Wright v. Cradlebaugh, 3 Nev. 341. There are fixed bounds to the power of the Legislature over the subject of evidence, which must not be exceeded. As to what shall be evidence and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights: Cooley's Constitutional Limitations, 4th Ed. 457. While the courts should treat with great respect the enactments of the legislative department of the government, yet the courts, which stand as the last resort of the citizen, and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even a legislature cannot do."

The same principle is clearly and forcibly stated in Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914, in the following language:

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an oppor-

> tunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: appear, and you shall be heard; and when he has appeared, saying: vour appearance shall not be recognized and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence."

The above language is quoted with approval in Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215, and many authorities cited on the subject, the court saying:

> "This language but expresses the most elementary conception of the judicial function."

And yet the California Legislature, in effect, said, by the amendment to section 1241 C. C. P., to the plaintiffs in error, you are called into court for the purpose of forcing you to part with the title to your property, but you shall not be permitted to speak, or introduce any evidence as to the facts which are required by law to

be found before the property can be condemned. Under such circumstances is it not true, as was said by the court in Windsor v. McVeigh, *supra*, that a

> "decree thus rendered" * * * "was, in effect, a mere arbitrary edict, clothed in the form of a judicial sentence."

In Missouri etc. Ry. Co. v. Simonson, 64 Kan. 802, 91 Am. St. Rep. 248, the rule now being considered was stated in the following language:

> "Is it in the power of the Legislature thus to create a conclusive presumption in a matter of private contract? We are constrained to believe that it is not. Every suitor is entitled to his day in court and to have his case determined on such evidence as legal policy will allow. It is doubtless competent for the Legislature to prescribe many of the rules of evidence. The subjects of the competency of witnesses, the order of trials, the burden of proof, the effect of public records, the certification of copies of official documents, the *prima facie* character of certain evidence, and other like matters which pertain to the practice rather than the right of proving causes are lawfully within the sphere of legislative regulation; but it is not within the power of the Legislature to exclude from the courts that which proves the truth of a case, nor, on the other hand, to compel them to receive that which is false in character * * *. In Cooley on Constitutional Limitations, fifth edition, 453, it is said: 'But there are fixed bounds

to the power of the Legislature over this subject which cannot be exceeded. As to what shall be in evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the Legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial, if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law."

Then, after citing a number of authorities, including Chicago etc. Ry. Co. v. Minnesota, 134 U. S. 418, the Kansas court said:

"The theory on which all these cases proceed is that an act of the Legislature

> which undertakes to make a particular fact or matter in evidence involving the substantive right of the case conclusive upon the parties, and which precludes inquiry into the meritorious issues of the controversy, is an invasion of the judicial province and a denial of due process of law. The Legislature may regulate the form and the manner of use of the instruments of evidence—the media of proof—but it cannot preclude a party wholly from making his proof. A statute which declares what shall be taken as conclusive evidence of a fact is one which, of course, precludes investigation into the fact, and itself determines the matter in advance of all judicial inquiry. If such statutes can be upheld, there is then little use for courts, and small room indeed for the exercise of their functions."

The condemnation of the amendment to section 1241 of the California Code of Civil Procedure could not be more accurately or strongly stated than in this opinion, and we respectfully submit that it is unconstitutional and void for the reasons therein stated.

See also:

12 Corpus Juris, pp. 823, 824, Sec. 285.

In the opinion of the District Court of Appeal it is said:

> "This contention (that the proviso is unconstitutional) is based upon the claim that the determination of the facts so found by the resolution were in their na-

> ture judicial, and since the action of the board in adopting the resolution was had *ex parte,* and without notice, or hearing given to appellants, the effect of the judgment based thereon was to deprive them of their property without due process of law * * *. When the use is public, the necessity of appropriating any particular property therefor is not a subject of judicial cognizance, but which appertains to the legislative branch of the government, and the right to so appropriate may be exercised by the state *or such subordinate bodies to which by legislative grant the power is entrusted.*" (Italics ours.)

As an abstract proposition this quotation may be conceded to be a correct statement of the law (for the purposes of this argument) and yet its fallacy, as applied to the case at bar, lies in the unwarranted assumption that the state of California has delegated the power "to so appropriate" the land of its citizens to any "subordinate" body—or in this case to the Board of Supervisors. On the contrary, as we have just attempted to show, and, we think, successfully, the state of California, by section 1241 C. C. P. and the whole chapter on Eminent Domain (C. C. P. sections 1237-1264) *has expressly required the courts to ascertain and find those essential facts* of the public use, the public necessity, and the proper location of the proposed improvement "before condemnation"

(California C. C. P. sections 1241, 1242), and hence the whole reasoning of the appellate court proceeds from a false premise, and necessarily results in an incorrect conclusion, insofar as the instant case is concerned.

On November 5, 1918, an amendment to section 14, article I of the California Constitution was adopted by a vote of the people. The section as amended reads as follows:

> "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation, except a municipal corporation or a county, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law [provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use, whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the

way of money deposits *as the court in which such proceedings are pending may direct,* and in such amounts *as the court may determine* to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, *including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law.* The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings.] The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier."

(NOTE: The only changes in the section effected by the said amendment are enclosed in brackets and the portions to which we call special attention are italicised.)

It will be observed that if any of the public agencies described in the amendment choose to ask possession of the property sought to be condemned, pending the litigation, they are required to deposit money in such amounts.

"as the court in which such proceedings are pending may direct * * * to secure to the owner of the property to be taken im-

> mediate payment of just compensation for such taking and any damage incident thereto, *including damages sustained by reason of an adjudication that there is no necessity for taking the property,* as soon as the same can be ascertained 'according to law'." (Italics ours.)

If it be true that the "legislative" fiat of the Board of Supervisors was conclusive evidence of the "necessity for taking the property," *how could there ever be "an adjudication that there is no necessity for taking the property"?*

The language of this constitutional amendment is utterly inconsistent with the conclusion of the appellate court on this question, and amounts to a constitutional declaration, insofar as California is concerned (whatever may be the rule elsewhere), that the question of the necessity for taking an owner's property for an alleged public use, in this state, is a judicial question, which must be "adjudicated" by a "court of competent jurisdiction" and by the orderly procedure, provided in such cases; and that such court can not be controlled in its decision upon the essential facts, required to be found "before condemnation," by a resolution of any of the political subdivisions, described in said constitutional amendment quoted *supra.*

In Mobile J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. Ed. 78, while the court sustained a statute of Mississippi declaring that

proof of injury inflicted by the running of trains was *prima facie* evidence of negligence, yet the principles therein announced would seem to indicate the soundness of the contention of plaintiffs in error with reference to the unconstitutionality of that portion of section 1241 of the California Code of Civil Procedure now being discussed. In that case the court said:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

Tested by the principles announced in this quotation is not the said portion of section 1241 now being discussed unconstitutional?

First, because no provision is made whatever for any hearing before any tribunal, as to the "(a) public necessity of such proposed public utility, or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury"; and

Second, because the section in question makes an arbitrary distinction when the resolution is adopted by a vote of two-thirds of all the members of the legislative body, and by a less number; and also when the land sought to be condemned is "located outside of the territorial limits" of the county, city or town, seeking to condemn the property.

In other words this law, in effect, provides that the legislative body of either of the political subdivisions, described in this section, may, by resolution, resolve to take certain property, and, provided two-thirds of its members vote for it, the owner shall not be heard to question the propriety of the taking; but if two-thirds of the members of such legislative body do not vote for the resolution, but only a majority do so, then he may be heard on all of the questions stated in the section.

Again, the same inconsistency and inequality in the law is shown by the last proviso of sub-

division two of section 1241 C. C. P. to the effect that the conclusive presumption does not apply, if the land sought to be condemned "lies outside the territorial limits" of the city, county or town, seeking to condemn. Why should a landowner *within* such territorial limits be subjected to burdens not imposed upon landowners *outside* the territorial limits of the political subdivision seeking to condemn? Is not this distinction "so unreasonable as to be a purely arbitrary mandate," as described in the opinion of the United States Supreme Court last cited? (Mobile etc. R. R. Co. v. Turnipseed, 219 U. S. Rep. 35.)

And does not the other distinction fall within the same classification, to-wit: when the resolution is passed by a vote of two-thirds of the members of the legislative body and when not? We think so, for it should make no real legal difference whether the resolution is adopted by a majority, or a two-thirds vote of its members, but the difference expressed in the law is fundamental. In the one case the landowner has guaranteed all the rights of a judicial investigation as to the public use, the necessity of taking the land therefor, and whether or not the improvement is located in a manner "most compatible with the greatest public good and the least private injury"; while, in the other, all of these questions are foreclosed by the adoption

of an *ex parte* resolution by a two-thirds vote, without any opportunity to be heard, either before the board, adopting the resolution, or by a court, upon a subsequent trial as to compensation. In effect, the law says: if the resolution is adopted by a two-thirds vote, all of the above questions of public use, necessity and location of the improvement are legislative, or political questions, upon which the landowner involved shall not be heard; but if the resolution is adopted by less than a two-thirds vote, or if the land is outside of the territorial limits of the county, city or town, then those questions are judicial in character and the landowner shall be heard in court, upon all of them.

It requires but a plain statement of the proposition involved to see that these distinctions created by the law in question are unreasonable and arbitrary, and sustain no rational connection "between the fact proved and the ultimate fact presumed." In the case at bar the only fact proved or required to be proved on these issues was the adoption of the resolutions by a two-thirds vote of all the mbers of the Board of Supervisors of Los ngeles county, and from this fact all of the issues, except as to compensation, were conclusively presumed in favor of the county.

If it be granted for the sake of the argument that the Legislature had the right to

"delegate to the boards of supervisors of the counties of the state the power to determine *ex parte* by resolution, as in the instant cases, the necessity for taking property for public uses," as was said in the opinion of the District Court of Appeal, yet it does not follow that it had the right to delegate such power to the boards of supervisors when two-thirds of their respective numbers should vote for the resolution, and withhold that power when the resolution is adopted by only a majority vote; because the effect would be, as we have seen, to make it a legislative question in the one case, and a judicial question in the other; dependent upon the size of the vote and also the location of the land sought to be condemned, to-wit: within or without the territorial limits of the county seeking to condemn.

It would be difficult to conceive of a more unequal application of the laws than would be not only possible, but probable under said section 1241, or a more flagrant denial of due process of law, where the land owners involved, as in the case at bar, happened to own the land within the territorial limits of the county, seeking to condemn, and the resolutions were adopted by a vote of more than two-thirds of the members of the Board of Supervisors of Los Angeles county.

In Luria v. United States, 231 U. S. 25, 58 L. Ed. 101, it was held that it was competent for Congress to declare that taking up a permanent residence in a foreign country within five years after the issuance of a certificate of citizenship, shall be considered *prima facie* evidence of the lack of intention of becoming a permanent citizen of the United States, at the time of the application for citizenship. In discussing the question the court said:

> "It will be observed that this provision prescribes a rule of evidence, not of substantial right. *It goes no further than to establish a rebuttable presumption which the possessor of the certificate is free to overcome.*" (Italics ours.)

The case of Mobile etc. v. Turnipseed, 219 U. S. 35 (cited *supra*) is quoted from at length in support of this proposition.

It is quite apparent from the reasoning in this case that the law would have been declared unconstitutional if, as in the case at bar, the fact had been declared, not *prima facie,* but conclusive evidence of the lack of intention to become a citizen.

It is plain to see that in the case at bar the legislative presumption declared by section 1241 was not merely a rule of evidence, creating a rebuttable presumption, but the provision in question created a conclusive presumption affecting a substantive right—the ownership and

continued possession of a strip of land about twenty-two miles in length, bisecting the Malibu Ranch, in a manner that inflicted upon the owners an irreparable injury.

In Turpin v. Lemon, 187 U. S. 51, 47 L. Ed. 70, the court said:

> "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that, in proceedings for the condemnation of land under the laws of eminent domain, or * * * *notice to the owner at some stage of the proceedings is essential.*" (Italics ours.)

And the author of the article on this subject, in Ruling Case Law, stated the proposition as follows:

> "The due process clause, in addition to its requirement of public use and just compensation, protects the land owner from the adoption of any form of procedure in eminent domain cases, which deprives him of a reasonable opportunity to be heard, and so to present such objections and claims as he is entitled to make." (10 R. C. L. p. 17, Sec. 14.)

As we have seen, the law in question deprives the landowner of all opportunity to be heard on any of the fundamental questions recited in said section 1241, provided the resolution is adopted by a two-thirds vote of the members

of the city, county or town, and it clearly falls within the inhibition of the Federal Constitution, as construed in the authorities cited.

The different treatment accorded to the four classes described in said section 1241, namely: when the resolution is adopted by a two-thirds vote, and when not; and when the land sought to be condemned is within the territorial limits of the political subdivision seeking to condemn and when not, is not based upon any "consideration of difference" growing out of this classification, and hence is as purely mechanical or arbitrary as the ordinance condemned in the case of Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 60 L. Ed. 523.

We fail to see any rational basis for a classification which gives to one landowner a judicial hearing, if his land is sought to be condemned, provided the resolution is adopted by only a majority vote, or is located outside the county, city or town; while another landowner is denied this right, and his land may be taken without any opportunity to be heard on any issue, except compensation, if, forsooth, the resolution happens to have been adopted by a two-thirds vote, and his land is located within the territorial limits of the political subdivision seeking to condemn.

In Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. Ed. 569, the court said:

> "By 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, *it must give them an opportunity to be heard respecting the justice of the judgment sought.* * * *
>
> "Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportuinty to be heard; *so also where title or possession of property is involved.*" (Italics ours.)

And the court then points out the difference between the requirements, where a general tax is involved, and the title or possession of specific property is in question, in order to satisfy the provisions of the due process article of the Federal Constitution, holding, of course, that the procedure for the assessment and collection of general taxes is necessarily very much less formal than in the other cases mentioned, and therefore the constitutional requirement is more easily satisfied.

It was said in King Tonopah Mining Co. v. Lynch, 232 Fed. 483, 494, that

> "we have no precise definition for due process of law. Its fundamental requisites, however, *are notice and the opportunity to be heard.*" (Italics ours.)

Citing in support thereof the following authorities:

Hovey v. Elliott, 167 U. S. 409, 418, 17 Sup. Ct. 841, 42 L. Ed. 215;

Louisville & Nashville R. Co. v. Schmidt, 177 U. S. 230, 236, 20 Sup. Ct. 620, 44 L. Ed. 747;

Simons v. Craft, 182 U. S. 427, 437, 21 Sup. Ct. 836, 45 L. Ed. 1165;

Twining v. New Jersey, 211 U. S. 78, 110, 29 Sup. Ct. 14, 53 L. Ed. 97.

This "fundamental requisite" was necessarily denied to the plaintiffs in error, because the *ex parte* resolutions, adopted by the Board of Supervisors, were under section 1241 C. C. P., and the opinion of the District Court of Appeal, *conclusive evidence* of all the issues involved, except the compensation to which they were entitled, after being assessed by the jury. They were denied the right to contest the necessity of taking the land for the proposed highway; or that it had been located in such a manner as to best serve the public interest, with the least private injury to them, and having been denied these fundamental rights, by express command of the section in question, it is difficult to see how it can be successfully contended that plaintiffs in error have not been deprived of their property without due process of law.

The only alternative to this conclusion is, that the state has the power, by legislative fiat, to determine that it will take certain property of its citizens for an alleged public use, without any hearing, except upon the issue of compensation, and if this is the law (which we deny) then there is no difference in the quality of such tyranny, and that asserted by the kings and queens formerly exercising rulership over us, against which tyranny our forefathers successfully waged battle in revolutionary days.

Our contention, therefore, leads us to this summary:

The law of California expressly provides that the public uses for which land may be condemned, as well as the necessity for the taking, and the location of the proposed improvement, are judicial questions; and being judicial questions, it was not lawful for the Legislature to declare that a resolution adopted by a board of supervisors by a certain vote, should be conclusive evidence of the fundamental issues involved, and thereby deprive plaintiffs in error of a hearing on these issues. Such a law, held to be valid by the District Court of Appeal of California (and approved by the Supreme Court of this state), has had the effect of depriving plaintiffs in error of their property without due process of law, and has caused them to be de-

nied the equal protection of the laws, in the particulars hereinbefore enumerated.

That the District Court of Appeal was in error in holding these questions to be legislative or political, and not judicial, is clear.

In Hairston v. Danville etc. R. Co., 208 U. S. 598, 52 L. Ed. 637, 641, the court said:

> "But when we come to inquire what are public uses for which the rights of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. *The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a Judicial question.*" (Italics ours.)

It necessarily follows that if it is a judicial question, the judicial mind may not legally be controlled by the legislative declaration to the effect that upon certain contingencies named, a resolution adopted shall be conclusive evidence of all the facts upon which the judicial conclusion must rest.

To give this effect to such a provision would be to convert our judges into rubber-stamps, compelling certain findings, however obnoxious, in particular cases, those findings might be to the conscientious judge, and however contrary to his sense of justice. And even the U. S. Supreme Court cases (cited in the opinion of

the District Court of Appeal in support of its conclusion) do not go to the extent indicated. In Secombe v. Milwaukee & St. Paul Railway Co., 90 U. S. 108, 23 L. Ed. 67, the court said:

> "The judgment of condemnation in this case was rendered by a competent court, charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist. A judgment thus obtained is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction."

It is true that a general rule is announced in this opinion for which it was doubtless cited, but the real decision is embodied in the above quotation.

In Miss. & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, the court explained, in effect, the respective functions of the legislative and judicial departments of government in the condemnation of land for public purposes. The court said:

> "The property may be appropriated by an act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been

> observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties, the owners of the land on the one side, and the company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the state."

That is exactly what the plaintiffs in error claim, namely, that the state of California has attached certain conditions to the right of any county to exercise the power of eminent domain and expressly declares that those "conditions" shall be found to exist before condemnation. In other words, "whether the conditions have been observed is a proper matter for judicial cognizance."

Because the Legislature also illegally attempted to control this judicial investigation by declaring a certain resolution to be conclusive evidence of the observance of these conditions, does not alter the fact, that the Legislature did delegate to the courts the power and the duty of ascertaining and finding the facts, necessary to be found, before the land involved in any condemnation suit could be condemned.

In the last analysis, therefore, the above authorities cited, in the opinion of the District Court of Appeal, do not sustain the broad conclusions therein reached, as applied to the case

at bar, but in principle sustain the contention of plaintiffs in error.

It follows that the conclusion of the appellate court was erroneous because it is based entirely upon the incorrect premise that in California the question of necessity for taking property under the power of eminent domain is exclusively a political or legislative question, and not a judicial one, and the premise being erroneous, the conclusion is equally erroneous.

And we could not more fittingly close the discussion on this branch of the subject than by a quotation from the opinion of Chief Justice Murray in the early case of Burgoyne v. Board of Supervisors of the county of San Francisco, 5 Cal. 9, found at page 20 of the opinion. He said:

> "The history of almost every nation is replete with struggles between the judicial, the executive, and legislative branches of government for unlimited supremacy, and demonstrates, that unless curbed by wholesome constitutional restrictions, each department will, in its turn, encroach upon and interfere with the functions of other co-ordinate branches of government. This spirit of usurpation and encroachment has been more frequently directed towards the judiciary than any other department. In England, it was only determined by resort to civil war, which resulted in the establishment of the entire independence of the judiciary, as well as the commons, while in this country, it has been avoided by the

enlightened wisdom and experience of the framers of our Federal and State Constitutions."

III.

The Holding of the Trial Court That the Resolutions Were Only Prima Facie Evidence of the Facts Recited Instead of Conclusive, Did Not Cure the Error, or Make the Amendment in Question Void as to Plaintiffs in Error.

The appellate court also holds that the plaintiffs in error were not injured because the trial court held that the resolutions offered in evidence were not conclusive, but only *prima facie* evidence of the truth of the essential facts, described in said section 1241 of the California C. C. P. [Tr. fols. 4278-4284]; but this argument we respectfully submit begs the question involved on this point.

The obvious answer to this contention is, that the resolutions in question were either conclusive evidence of the facts stated, or no evidence at all, because to hold otherwise would be in direct violation of the express terms of the code section involved herein. The authorities cited in discussing the next preceding question also support our argument on this, for the language of the section being clear, certain, and without ambiguity, cannot be modified or changed by

construction. In fact, there is no room for interpretation or for any conclusion except, that, upon the conditions named therein, the Legislature intended to make the resolutions conclusive evidence of the facts recited; and to arrive at the intention of the Legislature, is the cardinal rule for the construction of statutes.

Smith v. Randall, 6 Cal. 47.

And this intent must be found in the statute itself.

In Tynon v. Walker, 35 Cal. 634, the court, at page 642 of the opinion, said:

> "It is a universal principle of construction that courts must find the intent of the Legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto."

When the trial court held that the resolutions in the case at bar were at least *prima facie* evidence of the recited facts when the statute says they were conclusive evidence of such facts, it violated the rule of statutory construction above stated, by arbitrarily "subtracting from or adding to" the statute in question.

It is obvious that the intent of the trial court to thus limit the effect of section 1241 C. C. P. was to avoid the constitutional objections to

the validity of that section, as heretofore discussed, and it was for this reason that the trial judge adopted this construction, he frankly expressing the opinion that the statute would be unconstitutional in a case where the landowner was not given a previous opportunity to be heard before the board of supervisors, when his land was about to be condemned for highway purposes, as by the regular viewer method. [Tr. fols. 683-685 and 4029-4037.] But our contention is that it is not permissible to violate the plain and unambiguous terms of a statute in order to remove the objection of unconstitutionality. It is only when the language is doubtful, and one construction will lead to the conclusion that it is constitutional, and the other to the conclusion that it is unconstitutional, that it is permissible to resolve the doubt in favor of the construction showing the statute to be constitutional. But this is the limit of the rule as appears from its statement in the case of San Francisco v. Insurance Co., 74 Cal. 113, where at page 120 the court said:

> "Laws are not to be declared unconstitutional unless clearly so; and if two constructions are possible, and according to one the law must be held unconstitutional, and under the other construction it can be sustained, that construction must be adopted which will sustain the law. The principle is not disputed, and it is often of great value, but it must not be pressed so far as

> to amount to an abdication of its functions on the part of the court, nor a denial of justice to suitors. If we can clearly see that a law is beyond the power of the Legislature, we must so declare."

See also:

Burns v. Superior Court, 140 Cal. 1, 8.

If, therefore, as appellants contend, section 1241 was and is unconstitutional, if applied to the so-called direct method of commencing proceedings for condemnation of land for highway purposes, this result can not be changed by an arbitrary construction, doing violence to the express terms of the statute.

In the Mills Estate, 137 Cal. 298, 303, it was held:

> "Where the law makes a certain fact a 'conclusive presumption' *evidence cannot be received to the contrary.*" (Italics ours.)

And if the court erred in holding that the presentation of the resolutions created a *prima facie* presumption of the truth of the facts necessary to be found by the court before property can be taken (C. C. P., Sec. 1241), which the defendants were required to rebut by "clear and convincing proof to the contrary" [Tr. fol. 4037], then the motion for a nonsuit should have been granted.

Assuming, however, for the purposes of this branch of the argument, and in considering

the error in denying the motion for a non-suit, that the resolution which purports to authorize the bringing of this action is one that the supervisors had jurisdiction to pass, then, as it was purely ex *parte,* without notice or hearing of any kind, we maintain that it had no greater or other effect (if it had any effect at all) than to merely pass on to the Superior Court the determination of *all of the* questions which the law requires the county to establish —which "must appear" — "before property" sought to be condemned "can be taken."

Sec. 1241, C. C. P.

Further, if these matters (and we have already enumerated them) "must appear" as a condition precedent to the taking of the property, then the burden of proving each and every one of them *to the court* by a preponderance of the evidence rested upon the plaintiff, and the court erred in shifting to the defendants (*without taking any evidence concerning them*) the burden of disproving them.

The record proceedings in this regard are as follows:

"Mr. Burnell: Then, if Your Honor please, we will offer certain resolutions; we desire to offer in evidence a resolution found on page 344, volume 17, road book of Los Angeles county, the same being a resolution which is set forth in the complaint in the main or Malibu

road case (No. B-43572). The resolution being one that purports to have been adopted at a meeting of the board of supervisors of Los Angeles county held on the 26th day of August, 1916, and the record shows on the face of it that the resolution was carried by a vote of all the supervisors, the notation being as follows: 'On motion of Supervisor Hinshaw, duly seconded and carried by the following vote, ayes, Hamilton, Norton, Woodley, Hinshaw and Pridham—noes, none. It is ordered that the following resolution be and is hereby adopted.' Then follows the resolution.

"Mr. Anderson: We waive the reading of the resolution." [Tr. fols. 667-669.]

This was the resolution in the "Main Road" case.

Continuing:

"The next offer, if the court please, is the resolution of the board of supervisors, passed on the 3rd day of December, 1917, being at a regular meeting of the board of supervisors, of Los Angeles county, held on that date, being found in road book No. 19, commencing on page 77, being the resolution authorizing the condemnation of land for the right-of-way for the road we have referred to as the Los Alisos road (in case No. B-59443).

"Mr. Anderson: We have no objection to it being deemed read, we only object to his saying that it was 'Authorizing.' We will substitute for that, 'Purporting to authorize.'

"Mr. Burnell: I am reading the title out of the book.

"Mr. Anderson: They may be deemed admitted on the same objection, as we made to the resolution in the main case.

"Mr. Burnell: It is the original resolution of condemnation and we desire at this time in connection with that to read this part: 'On motion of Supervisor McClellan, duly seconded and carried by the following vote, ayes, Woodley, McClellan, Dodge and Hamilton; noes, none; it is ordered that the following resolution be and the same is hereby adopted.' And then follows the resolution as set forth in the complaint in the Los Alisos Canon case." [Tr. fols. 676-678.]

This was the entire evidence in chief of the plaintiff.

Continuing:

"Mr. Anderson: Have you rested?

"Mr. Burnell: Yes, we have rested.

"Mr. Anderson: If the court please, we wish to move for a non-suit on the ground that the plaintiff in this action has failed to prove the facts which section 1241 of the Code of Civil Procedure must be made to appear before the plaintiff can condemn the property.

"*First*—That they have failed to prove that the taking is necessary to the use in question, namely: highway purposes.

"*Second*—That they have failed to prove the public necessity of such proposed public utility or public improvement.

"*Third*—That they have failed to prove that such property which it is proposed to be taken is necessary therefor.

"*Fourth*—That they have failed to prove that such public utility or public improvement is planned or located in the manner which would be most compatible with the greatest public good and the least private injury.

"Without arguing the matter, I will simply state that our position is simply this: That if

the proviso in section 1241 (C. C. P.) is, as we contend and as Your Honor has in a sense held, unconstitutional, there is nothing else in the statute which makes the resolution on which they rely—makes it *prima facie* evidence. In other words, the statute seems to contemplate that while the resolution can be adopted, the matters to be determined that I have just enumerated, are to be determined by the court, and there is nothing which makes the resolution itself, so far as I can find in the law, *prima facie* evidence. In other words, eliminating that proviso, the law simply stands that the burden is on the plaintiff to make these facts appear before condemnation can be had.

"The Court: The motion for judgment of non-suit will be denied." [Tr. fols. 681-685.]

This situation thus disclosed speaks for itself.

Without any authority of which we are aware to support its ruling, the court accepted these *ex parte* resolutions as not only *prima facie* evidence of the alleged *facts which they recite,* but as *prima facie* evidence that the Board of Supervisors *had considered,* and, at least *prima facie* determined, other of the necessary vital and fundamental facts required by law to be established, *but upon which the resolution itself is silent.*

The effect of this ruling was to hold that the proviso adopted by the Legislature did not mean what it said, and yet that the resolutions, while not conclusive of the facts, did in effect *prima facie* establish all the material allegations of the complaint, and shifted the burden

of disproving the presumption raised thereby to the plaintiffs in error.

And the appellate court, while holding that the trial court was in error in its ruling that the resolutions were only *prima facie* evidence of the facts specified, in section 1241 C. C. P., instead of conclusive evidence of those facts, held that the defendants in that case, plaintiffs in error herein, were not prejudiced by the ruling because the parties were permitted to introduce evidence on the issue of necessity. But the error in denying the motion for a nonsuit, based upon the fundamental objection to the effect given to these resolutions, adopted by the Board of Supervisors of Los Angeles county, was not cured by the subsequent introduction of testimony.

It is conceded that if a motion for a nonsuit is erroneously denied, and thereafter during the trial the defects are supplied by evidence introduced by either party that the error committed in overruling the motion is waived (Lowe v. S. F. etc. Ry. Co., 154 Cal. 573, 576, and cases cited), but the error committed by the trial court on this question went beyond the overruling of appellants' motion for a nonsuit. The trial judge held, as we have seen, that the resolutions when introduced in evidence created a presumption of the truth of the facts necessary for the court to find before the land of

appellants could be taken, which presumption could be "overthrown only by clear and convincing proof to the contrary" [Tr. fol. 4037], introduced by the defendants, thereby reversing the usual rule that the burden of proof is and was upon the plaintiff to establish all the facts necessary to entitle plaintiff to the relief sought. This error was not waived by the production of evidence by either party upon the issues prescribed by section 1241 C. C. P., because the reason for the waiver would not apply to such a situation. When defects in the proof existing at the time a motion for a nonsuit is made are subsequently supplied, it is quite plain that it would be a highly technical rule to hold that the first error in overruling the motion for a nonsuit was not cured by the evidence thereafter admitted; but, in the case at bar, the error of which appellants complain persisted to the end of the trial because the trial judge not only denied the motion for a nonsuit, but based his decision of the public necessity, etc., for the road, at least in part upon the consideration that the appellants had not met the "burden of overthrowing and removing the presumption" created by the introduction of the resolutions in evidence, "by clear and convincing proof to the contrary." [Tr. fols. 4036-4037.] If we are correct in our contention that no such presumption existed in the case at bar, for the reasons

stated, it follows that an attempt by appellants to meet the burden of proof imposed by the court by this ruling, did not constitute a waiver of such error.

See:

Koyer v. Willmon, 12 Cal. App. 87.

It appearing in the record that the court did shift the burden of proof from the plaintiff to the defendants, we have the right to assume that the findings as to public necessity and location of the roads in question would have been different but for the constant pressure of this erroneous ruling, imposing the burden upon the defendants to rebut the *prima facie* case alleged to have been proven upon the production of the resolutions adopted by the Board of Supervisors of Los Angeles county. In other words, the resolutions were either conclusive evidence of the facts stated in section 1241 C. C. P. or were no evidence at all, and the ruling of the court that they established a *prima facie* case for plaintiff, which shifted the burden of proof upon those issues to the defendants, was wholly unwarranted by the section in question, or by any principle of law, and was and is prejudicial error, even though evidence was subsequently offered by plaintiff and defendants on those issues, upon which the court was expressly required by law to make findings. *Non constat*

but for this erroneous ruling as to the burden of proof, the findings on such issues would have been in favor of appellants as to all of the proposed roads, instead of in favor of respondent.

This error was very prejudicial to the plaintiffs in error.

In Spring Valley Water Co. v. Drinkhouse, 92 Cal. 528, 532, the court said:

> "There is no doubt of the proposition, that before land can be taken for a public use it must appear that the taking is necessary for such use. This is a question of fact to be determined by the court or jury in view of all the evidence in the case, and the burden of proof is upon the plaintiff."

In the case of City of Santa Ana v. Gildmacher, 133 Cal. 395, the court said:

> "In an action to condemn private property for a public use, the question of necessity is one of fact, to be determined by the jury, in view of all the evidence in the case. (Spring Valley Water Works v. Drinkhouse, 92 Cal. 528.) The evidence should show that the land is reasonably required for the purpose of effecting the object of its condemnation. (Spring Valley Water Works v. Drinkhouse, 92 Cal. 528.) I think that the court invaded the functions of the jury in directly a verdict for the defendant. The court took from the jury the principal issue of fact in the case, and in so doing made all other issues immaterial. The court charged the jury

in respect of matters of fact, in the sense of the constitutional prohibition. If there had been no evidence tending to show a reasonable necessity for taking defendant's property, it would not have been prejudicial error for the court to grant a nonsuit (*In re* Spencer, 96 Cal. 448); or if the evidence had been such as that a verdict for plaintiff would have been contrary to the evidence, the error would be regarded as immaterial (Levitzky v. Canning, 33 Cal. 299); but we think there was evidence of a substantial character bearing directly on the issue of fact,—namely, the necessity for taking the property,—and as this issue was for the jury, it ought to have been left for them to decide * * *. The question of public necessity in a given case involves a consideration of facts which relate to the public, and also to the private citizen whose property may be injured. The greatest good on the one hand and the least injury on the other are the questions to be determined, and these questions are for the jury, in passing on the question of necessity. The jury may as safely be trusted to rightly solve these questions as the court, and whether so or not, our system of jurisprudence requires that they shall first be submitted to the jury."

Another patent error resulting from this ruling of the trial judge, approved by the appellate court, was that while the trial judge held that the questions of necessity and proper location of the proposed highways were in this case judicial questions, *yet he gave to the resolutions the effect which they could only have had,*

if those questions were in fact held to be legislative or political in character. To make this point clear, we quote an excerpt from the decision of the trial court on the question of necessity:

"The county of Los Angeles instituted the above numbered three separate special proceedings to condemn for public use, to-wit, for road purposes, certain property of the defendants aforesaid. The property sought to be condemned lies entirely within the Rancho Malibu, is situated in the county of Los Angeles, state of California, and consists of three strips of land each forty feet in width, and sufficient contiguous parcels of land at the sides of said strips to build three roads, each to grade twenty-two feet wide. The proceedings, while not consolidated, were, by agreement of the parties, tried simultaneously. For convenience they have been called throughout the trial, 'The Main Malibu Road Case,' 'The Los Alisos Road Case' and 'The Beach Road Case,' respectively. A jury was regularly impaneled and in each case the issues of compensation for the taking of said property have been determined by said jury by special findings made and filed herein. There remain three questions for decision by the court. These questions are: First, whether there existed public necessity for the proposed roads at the respective times when the Board of Supervisors regularly passed resolutions of necessity and directed the county counsel to begin condemnation proceedings; second, whether the proposed roads are planned or located in the manner which will be most compatible with the greatest public good and the least private injury.

"These questions usually in eminent domain proceedings are determined by the legislative branch of government and when regularly determined by it, are not thereafter subject to judicial inquiry or review; but inasmuch as it is conceded that the Board of Supervisors in each of these cases have failed to pursue the course required by sections 2681 and 2698 inclusive of the Political Code, which is the usual method adopted by counties in laying out new roads and taking property necessary therefor, *we have held during the trial that they become judicial questions in each of these cases.*" (Italics ours.)

If the trial court was correct in holding that the questions stated were judicial in character, then it was wholly inconsistent with this ruling to hold that the resolutions introduced in evidence proved anything, except, perhaps, that the condemnation proceedings were duly authorized by the Board of Supervisors, and that they contained a description of the land sought to be condemned. Having held the stated questions to be judicial, the facts were required to be proven as other facts, in trials of causes, and not by a resolution adopted by a political subdivision of the state. This distinction was pointed out in the case of Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 674-5, in which case the court held that where the special procedure for establishing highways is followed (Cal. Pol. Code, Sec. 2681 *et seq.*) jurisdiction is acquired to determine these ques-

tions, and they are not subject to judicial review, *but where the special procedure is not followed, and the condemnation proceedings are prosecuted under general laws, then all the questions necessary to be determined are judicial, and the facts must be established in the well recognized way.*

One of the cases cited in the opinion last cited is Wulzen v. Board of Supervisors, 101 Cal. 15, which case is also cited by the District Court of Appeal, in support of the decision in the instant case, but, when rightly considered, it supports the contention of plaintiffs in error; for it held that the Board of Supervisors of San Francisco exceeded its powers in the resolution of intention for the condemnation of land to open Market street, because it encroached upon the judicial functions of the court, and the judgment of the lower court, upon the application for a writ of review, sustaining the action of the said board, was reversed by the Supreme Court of the state of California.

The conclusion inevitably follows that the trial court correctly decided that the questions of necessity, etc. (quoted *supra*) were judicial questions, under the California law, and the District Court of Appeal erroneously decided to the contrary; and the trial court having correctly held the said questions to be judicial, in-

correctly gave the same effect to the resolutions adopted by the Board of Supervisors, as if the questions quoted were legislative, or political in character, by declaring them *prima facie* proof of the facts required to be found, and shifting the burden of rebutting the presumption raised thereby to the plaintiffs in error.

That the citizen should not be compelled to give up his property, even though compensated therefor, except where the public necessity requires it, is elementary and in California this question must be determined by the courts, upon competent evidence, and not by resolutions adopted by boards of supervisors. This right is clearly set forth in the case of Commonwealth v. Sawin, 2 Pick. (Mass.) 547, as follows:

> "Every citizen through whose land the road may pass, and who therefore may be subjected to the inconvenience of having his farm, house, lot or garden spot taken from him for this purpose, has a right to require that he be not disturbed in these enjoyments, except the public common convenience or necessity require it. It is true he may be compensated in money for his loss of the pecuniary value of his property; but by the principles of our government, no man's property can be taken from him, even if he is paid for it, without his consent, except it is actually wanted for public use. It often happens that there is a value, in the owner's eye, of particular spots of ground, which no compensation in money

> will be deemed an equivalent for. Where the public necessity or convenience demands, he must surrender his favorite field or flower-garden for its value in other men's eyes, but until then he has a right to cherish his prejudices, and even his whims, in relation to his property. So that even if the town and the individuals who want a road through it should concur in this application to the Court of Sessions, he ought not to be disturbed, unless it can be honestly adjudged that the public interest demands the sacrifice. (Op. pp. 547-548.)"

The courts (Superior and Appellate) permitted the judgment of the Board of Supervisors to be substituted for their judgment on this fundamental question and did not actually adjudicate that the "public interest demands the sacrifice" of this property by the plaintiffs in error.

We conclude, therefore, that the trial court was not justified in holding that the resolutions were *prima facie* evidence of the facts required to be found in condemnation proceedings, and that the fourth question should be answered in the negative.

IV.

Plaintiffs in Error Have Been Deprived of Their Property Without Due Process of Law and Have Been Denied the Equal Protection of the Laws, in Violation of the Fourteenth Amendment to the Federal Constitution.

The fifth question has already been answered, for if the preceding argument is sound and supported by the authorities cited, it follows that the owners of the property involved in these condemnation suits have been deprived of their property without due process of law, and have been denied the equal protection of the laws, as guaranteed by the fourteenth amendment to the Federal Constitution.

In the opinion of the District Court of Appeal, excerpts from the opinions in Board of Water Commissioners v. Johnson, 84 Atl. 727, and Wulzen v. Board of Supervisors, 101 Cal. 15, are quoted, to the effect that the determination of the question of whether or not the right of eminent domain should be exercised, and what lands are necessary to be taken, in the exercise of that right, is a political and legislative question and not a judicial one, and that therefore owners of such property are not denied due process of law because no hearing on these questions has been provided for. But the

fallacy of this argument as applied to the case at bar, as we have attempted heretofore to demonstrate, is, that in California, these essential questions are expressly made judicial questions, not only by the code sections cited (C. C. P. 1241 *et seq.*), but also by the amendment of 1918 to article I, section 14 of the California Constitution (quoted *supra*). And, having made these questions judicial, by these statutory and constitutional provisions, the Legislature, in its attempt to make the *ex parte* resolutions of a political subdivision of the state conclusive evidence as to these essential facts, without any hearing at all being provided for, did have the effect of depriving plaintiffs in error of their property without due process of law, and denying to them the equal protection of the laws; because by well settled practice, all judicial questions must be determined by the courts, upon competent evidence, and with the untrammeled power to hear and determine the law and the facts, without dictation by the legislative department of government.

And the fact that the trial court, from an innate sense of justice, felt compelled to accord to the plaintiffs in error a hearing on the question of necessity, does not answer our contention that they were deprived of their rights guaranteed by the Federal Constitution. For what was granted was, according to the ap-

pellate court, a matter of grace and not of right, and hence the ultimate decision rested upon the effect given to the *ex parte* resolutions of the Board of Supervisors of Los Angeles county. In other words, the question here being discussed must be determined upon the effect of the proviso to section 1241 of the California Code of Civil Procedure, as it reads and as construed by the District Court of Appeal, rather than by the attempt of the trial judge to "temper the wind to the shorn lamb," by permitting, *ex gratia,* evidence as to the necessity for taking the land described in the complaints, for the proposed roads, upon the theory that the resolutions were only *prima facie* evidence of the facts required to be found, because there had been no previous hearing of any kind given to the owners of the land on these vital questions.

As was said by Judge Earle in Stuart v. Palmer, 74 N. Y. 183, (cited with approval by Mr. Justice Matthews in Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 768):

> "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them and give them a right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly

> apportioned. The constitutional validity of law is to be tested, *not by what has been done under it, but by what may by its authority be done.* The Legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice." (Italics ours.)

See also the following authorities to the same effect:

> Matter of Lambert, 134 Cal. 626, 634, and cases cited.

The proviso to section 1241 of the California Code of Civil Procedure, as we have already pointed out, imposes special rules of evidence affecting substantive rights upon defendants, in condemnation cases, when the land is located within the territorial limits of the political subdivision seeking to condemn, and the resolution is adopted by a vote of two-thirds of its members radically different from the conditions imposed when the land is located outside of said territorial limits, and the resolution is adopted by less than two-thirds of the members of the governing body of said political subdivision.

It has been decided many times in California that such invidious distinctions are unconstitutional and we cite by way of illustration some of these authorities.

In City of Pasadena v. Stimson, 91 Cal. 238, the court held that a law requiring cities of the

sixth class to make an effort to agree with the owner for the purchase of his land as a condition of commencing a condemnation suit was unconstitutional, because it did not impose a similar condition upon other cities or persons who were authorized to acquire land, by condemnation, for a public use. And the conclusion was stated as follows:

> "The conclusion is, that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law."

In Builders Supply Depot v. O'Connor, 150 Cal. 265, the court held that a California statute allowing an attorney's fee to the plaintiff in a mechanic's lien suit, but none to the defendant, even though successful, was a violation of the state constitution as well as the fourteenth amendment to the Federal Constitution quoting from the case of Gulf etc. Ry. Co. v. Ellis, 165 U. S. 170 (41 L. Ed. 666), as follows:

> "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals

> are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong. They do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

And many other cases are reviewed in the opinion last cited, showing many types of discrimination declared to be unconstitutional, and the principle decided, and the cases cited, in the opinion, are conclusive in the case at bar.

Apply these principles to section 1241 of the California Code of Civil Procedure, and we at once see that it is subject to the same criticisms. This section singles out the landowner who owns land in a certain locality, and when the resolution of a certain political subdivision of the

state is adopted by a two-thirds vote of its governing body, and denies to such landowner any hearing whatever upon the vital facts catalogued in the said section, whereas, as to all other persons whose land may be condemned for public purposes, they are accorded a hearing by the court without any presumptions whatever against them. In the language of the Supreme Court of the United States in the case last cited,

> *"They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."* (Italics ours.)

In *Ex parte* Sohncke, 148 Cal. 262, 113 Am. St. Rep. 236, the court held that a law fixing rates of interest and charges on chattel mortgages secured by certain specified kinds of personal property, and prescribing penalties for a violation thereof, was a violation of the California Constitution as well as the Federal Constitution; citing in support thereof:

> Connolly v. Union Sewer Pipe Co., 184 U. S. 563, 46 L. Ed. 679,

which very clearly enunciates principles and reviews authorities which, when applied to the case at bar show that the amendment of 1913 to section 1241 was and is in contravention of the Fourteenth Amendment to the Federal Constitution in that it denies to plaintiffs in error

and others in like position the equal protection of the laws.

It also follows from this conclusion that the judgments of condemnation entered in the case at bar should be reversed, for the judgment of the Appellate Court, affirming these judgments of the trial court, was predicated upon the validity of this amendment to said section 1241, C. C. P. That section, before the Amendment of 1913, required the court to find as a fact before it could condemn land: "(1) That the use to which it is to be applied is a use authorized by law; (2) That the taking is necessary to such use." And section 1242 of the California Code of Civil Procedure also required that the state and its agents who may exercise the right of eminent domain shall locate the improvement "in the manner which will be most compatible with the greatest public good and the least private injury," which, of course, was another issue of fact upon which the landowners had the right to be heard before the enactment of the amendment of 1913 to section 1241, which denied them that right, by declaring the *ex parte* resolutions of the agent seeking to condemn, *conclusive evidence* upon all of those fundamental and essential questions of law and fact, which the court was required to find "before condemnation."

The result, therefore, is as we contend, that the amendment in question is unconstitutional and void, and the section, as it existed before the amendment is the law which should have been applied to the case at bar, and not having been done, the judgments should be reversed.

Conclusion.

In conclusion the plaintiffs in error most respectfully contend that their rights of property, guaranteed to them by the Constitution of the state and the Nation, have been violated, and their property taken without due process of law, and that they have been denied the equal protection of the laws as herein specifically set forth. Their property has been taken without due process of law:

1. Because no hearing was provided by law before the Board of Supervisors, on the questions of the public use; the necessity for taking the property for that use, and whether or not the proposed highways were located in the manner most compatible with the greatest public good and the least private injury;

2. Because they were also deprived of any hearing on these vital issues, before the court by the amendment of 1913 to section 1241 of the California Code of Civil Procedure, which declared the *ex parte* resolutions of the Board

of Supervisors (if adopted by a two-thirds vote) conclusive evidence of the essential facts involved.

3. Because the issues required to be determined before the land of plaintiffs in error could be taken, were and are judicial questions, under the Constitution and laws of California, and the amendment in question, sought to, and did, control the judicial discretion by the illegal and unwarranted declaration as to the effect of the resolutions adopted by the Board of Supervisors, thereby in effect taking their property by legislative decree, rather than by the judgment of a court, as required by the law of California, before the adoption of the amendment, and since, by the Constitutional Amendment of 1918.

4. Because it affirmatively appears from the record that the proposed roads were not required for a public use, or authorized by law, in that they were located exclusively upon private property "without outlets or feeders of any kind or character," and were located "wholly and solely upon and give access wholly and solely to the private ranch property of the defendants May K. Rindge and Rindge Company; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel." [Tr. fols. 311-312.]

5. And the plaintiffs in error were and are denied the equal protection of the law in that if any of the agents of the state sought to condemn land outside of the territorial limits of the particular political subdivision seeking to condemn, or, if the resolutions of condemnation were passed by less than a two-thirds vote, then all of the issues referred to in section 1241, C. C. P., would be judicial questions and determined upon evidence duly offered upon the trial; while all landowners (including plaintiffs in error herein) not within the specified classes, would have their rights conclusively adjudicated by the adoption of the *ex parte* resolutions, without any hearing, either before the said political subdivision (Board of Supervisors in the instant case) or the court having jurisdiction of the case.

Unless we are to adopt the maxim that the Legislature (as the supposed representative of the people) can do no wrong (after we have repudiated the outworn maxim of royalty that the king can do no wrong) it seems to us that this amendment of 1913 to section 1241 is a plain usurpation of authority, which had the effect of causing an arbitrary decree to be entered, depriving plaintiffs in error of their property without due process of law, and denying to them the equal protection of the law guaranteed by the Fourteenth Amendment to the

Federal Constitution. And for these manifest errors, plaintiffs in error respectfully request that the judgments of condemnation entered in the two cases involved herein, be reversed, and that all proceedings taken thereunder be declared null and void.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 237.

RINDGE COMPANY, A CORPORATION; MAY K. RINDGE, HUENEME, MALIBU & SOUTHERN RAILWAY, A CORPORATION, AND HUENEME, MALIBU & PORT LOS ANGELES RAILWAY, A CORPORATION,
Plaintiffs in Error,

vs.

COUNTY OF LOS ANGELES,
Defendant in Error.

RINDGE COMPANY (A CORPORATION),
Plaintiff in Error.

vs.

COUNTY OF LOS ANGELES,
Defendant in Error.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

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IN THE

Supreme Court of the United States

No. 237.

RINDGE COMPANY, A CORPORATION; MAY K. RINDGE, HUENEME, MALIBU & SOUTHERN RAILWAY, A CORPORATION, AND HUENEME, MALIBU & PORT LOS ANGELES RAILWAY, A CORPORATION,

Plaintiffs in Error,

vs.

COUNTY OF LOS ANGELES,

Defendant in Error.

RINDGE COMPANY (A CORPORATION),

Plaintiff in Error.

vs.

COUNTY OF LOS ANGELES,

Defendant in Error.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

As has heretofore been stated, the record in this case embraces two separate appeals, being two separate condemnation actions, No. B-43572 and No. B-59443, respectively (Tr., Vol. I, Fols. 1-119 and 553-577). Both of these cases were by stipulation of the

parties and by order of the court tried at the same time, but not consolidated. (Tr., Vol. 1, Fol. 642.)

Another case, No. 65893, is referred to in the stipulation, but was decided in favor of these plaintiffs in error and need not be further considered.

In the court of first instance the plaintiffs in error raised the question of the constitutionality of Section 1241 of the California Code of Civil Procedure, which section is set out in full at pages 66-68 of the opening brief of plaintiffs in error. That question was raised by a special defense in the amended answer of May K. Rindge, which special defense alleged in substance that the proposed roads were located entirely upon private property, were not a public necessity, and that the condemnation would be for private purposes and in contravention of the provisions of the Constitution of the United States and particularly in violation of the Fourteenth Amendment to the Constitution of the United States and would be void and without due process of law and would constitute a denial to the defendants of the equal protection of the laws. (Tr., Vol. I, Fols. 303-315.) The same defense was alleged in the amended answer of the Rindge Company. The County of Los Angeles, the original plaintiff and the present defendant in error, moved to strike out this special defense "upon the grounds and for the reason that all of the matter asked to be stricken out and each of the separate matters, is irrelevant and immaterial and constitutes mere surplusage and conclusions of law of the pleader and none of the matters asked to be stricken out, are matters of fact, ultimate or otherwise, nor are any of them allegations upon which the court would have the right or the power to receive evidence." These motions of the plaintiff were

granted and the special defenses referred to stricken out (Tr., Vol. I, Fols. 654-660). The action of the court of first instance in so striking out these special defenses was affirmed by the District Court of Appeal, Second Appellate District, Division One (Tr., Vol. III, Fols. 4282-4289).

It is of the utmost importance, for a full understanding by the court of the facts involved in these cases, that the situation of the property involved and something of its previous history should be clearly set out. The property through which condemnation is sought to be made is that known as the Malibu Ranch, which is an oblong shaped piece of ground along the shore of the Pacific Ocean, approximately twenty-two miles in length and varying in width from one-half mile to one and one-half miles. In this vicinity the line of the coast runs almost exactly east and west, not north and south. The road sought to be condemned in the "Main Road" case runs directly through this long and narrow strip of land and ends at the county line where Los Angeles County stops and Ventura County begins. It is admitted that there is no connection in the way of a public road or highway at present in Ventura County and it is not claimed in the record that any such road is contemplated. The road sought to be condemned in the "Alisos Canyon Road" case is a branch from the so-called "Main Road" running in a general northerly direction to the boundary line of the ranch on the north, and there is no connection by public road or highway with the said proposed Alisos Canyon road at that point or at any point near the end of the said road. The evidence of these conditions is scattered throughout the entire record, but it is not considered necessary to refer to

the many instances where the evidence is set out because, as heretofore stated, these facts are not disputed by the defendant in error.

Having in mind the location and general nature of the ranch property and the location of the roads proposed to be built on that property, it is interesting to note that the present litigation is only a part of a long series. The present litigation may be said to have had its inception with the passage of the resolutions by the Board of Supervisors of Los Angeles County, which resolutions are referred to in the record. (Tr., Vol. I, Fols. 9-48.) These resolutions were passed on August 26, 1916. The condemnation proceedings themselves were begun by the filing of the Complaint, October 18, 1916.

On December 3, 1907, there had been instituted in the District Court of the United States for the Southern District of the State of California, Southern Division, Case No. 1379, entitled, "United States of America vs. M. K. Rindge as the executrix of the estate of Frederick H. Rindge, deceased, *et al.*" The object of that suit, as stated by the district judge in his opinion, was to obtain a decree enjoining and restraining the defendant from maintaining certain fences or obstructions, on the grounds (1) that the Beach Road and the roads used by the settlers up the various canyons are public highways and necessary for access to government lands; (2) that at the time the defendants obtained title to the ranch property there was reserved by implication title to the government and its grantees a right of way over the defendant's land; (3) that the construction and maintenance of the fences in question, though on the defendant's own land, constituted an unlawful en-

closure of public lands within the meaning of the Act of Congress of February 5, 1885. (Tr., Vol. I, Fols. 772-774.) A restraining order was issued December 4, 1907, and was continued in force until final decision of the case, which decision was made October 27, 1913, resulting in a decree dismissing the Bill of Complaint after an opinion of the court sustaining all the contentions of the defendants and overruling those of the government.

On December 16, 1907, there was instituted in the Superior Court of the State of California in and for the County of Los Angeles, a suit entitled, The People of the State of California vs. May K. Rindge, testatrix (executrix) of the estate of Frederick H. Rindge, deceased, *et al.* (Tr., Vol. II, Fols. 2747-2748.) That cause came on for trial October 6, 1908, and resulted in a finding in favor of the people and the existence of a certain public road or highway in the County of Los Angeles extending from the city of Santa Monica in a northwesterly direction, along the shore of the Pacific Ocean, to the Ventura County line. May 2, 1910, a decree was signed which embodied the findings above set out. (Tr., Vol. II, Fols. 2754-56.) This decree contained an injunction restraining the defendants and all persons claiming under them from asserting or claiming any right, title and interest in the road adverse to the people of the State of California. An appeal was taken by the defendants to the Supreme Court of California, and on April 7, 1917, that Court rendered an order reversing the order of the lower court which denied a new trial. The injunction had remained in force from May 2, 1910, to April 7, 1917. (Tr., Vol. II, Fols. 2757-61.)

ARGUMENT.

The facts being as above set out and being in each instance undisputed, it is now necessary to take up in order the points relied upon by the defendant in error, which are four in number:

"First: That this court is without jurisdiction.

Second: That the California Code of Civil Procedure, Section 1241, as amended in 1913, is not repugnant to the due process of law clause of the Federal constitution.

Third: Plaintiffs in error were not denied the equal protection of the law.

Fourth: The striking out of the special defenses did not prevent plaintiffs in error from raising the question whether the land sought to be condemned was being taken for a public use authorized by law."

There is a clear-cut issue in this court on each one of the foregoing propositions and the plaintiffs in error will now present their reply to the contentions of the County of Los Angeles as set out in its brief.

FIRST.

THIS COURT HAS JURISDICTION.

At the outset it is well to state fully what occurred in the court of first instance with regard to its holding concerning the amendment of 1913 to Section 1241. The defendant in error states on page 10 of its Brief:

> "Plaintiffs in error claim that the amendment of 1913 to Section 1241 is unconstitutional and void. The same claim was made in the trial court and that court agreed with them and pro-

ceeded as though the amendment had never been enacted."

It is submitted that the record does not justify the statement that the court "proceeded as though the amendment had never been enacted." A reference to the opinion of the judge of the court of first instance (Tr., Vol. III, Fols. 4032-4039) will show that so far from ignoring the statute and proceeding as if it had never existed, the judge specifically held that the matters which the statute declared in plain terms should be conclusive evidence were, in his view, to be given the force only of *prima facie* evidence.

The defendant in error then proceeds to quote at considerable length from the opinion of the District Court of Appeal, which quotation shows the view of the court to be that even though the lower court struck out as immaterial and irrelevant the pleadings which plaintiffs in error offered as a basis for their proof, nevertheless, because the court later heard evidence tending to substantiate the portions of the pleadings stricken out as immaterial, consequently the error, if any was committed, was thereby cured. In other words, the contention of the defendant in error is that the court may state in advance that evidence of a certain class is irrelevant, immaterial and surplusage and that if later the court receives such evidence the error of striking out the offer to produce such evidence is cured. It appears to us that the mere statement of this position is enough to demonstrate its illogical, inconsistent, unfair and arbitrary character. It is submitted that the lower court must take one ground or the other. It must hold the pleadings to be surplusage and the matter and offer immaterial

and irrelevant and consequently exclude any evidence thereunder or it must allow such pleadings to remain in the record and then receive evidence tending to prove the same.

If, however, evidence was received by the court without restriction, the only logical inference which can possibly be drawn is that it did not receive the slightest consideration when it was offered and admitted, because the court had previously stated in the plainest terms that it would regard such evidence as irrelevant and immaterial. It is obvious, consequently, that it could not give it any consideration when it was received, and it is to be presumed that it did not give it any consideration. If it had intended to give it any consideration it would have allowed the pleadings to remain in the record.

The defendant in error states again, on page 14 of its brief, that the statute in question was construed by the trial court as unconstitutional and void. It is submitted, as heretofore set out, that such was not the case. The Court gave the statute a strained construction in the apparent effort to sustain it as constitutional. The court then proceeded, under the statute, and received as evidence the resolution of the Board of Supervisors as to which the statute in question spoke, but instead of holding that the statute meant what it said and that those resolutions were conclusive evidence of the facts therein set out, the court held that they were *prima facie* evidence of the facts therein set out. In other words, the court left the statute as it found it and proceeded under it, save and except only that it changed the word "conclusive" to the words "*prima facie.*" If the court had found the statute in question to be void, unconstitu-

tional and of no effect, the natural and only course for the court to take would be to hold that no proceedings whatever that were begun under the statute could have any effect and the court would have consequently ignored its existence altogether. The opinion of the trial court heretofore referred to shows conclusively that such was not the course it took.

The defendant in error devotes the remainder of its discussion of this point, to attempting to show that the Federal question, if any, in the present case is overshadowed by certain alleged matters of local law and consequently this court cannot take jurisdiction. The plaintiffs in error do not dispute the general propositions laid down by the defendant in error with regard to this branch of the case, but we do respectfully and earnestly submit that those general principles have no application to the present case. The Federal question in this case was urged at the outset in the trial court and was relied upon in the Court of Appeal. There has never been a time since these condemnation proceedings started when the plaintiffs in error have neglected a single opportunity to urge the existence of the Federal question and to urge that they were being deprived of their rights without due process of law and in violation of the provisions of the Fourteenth Amendment to the Federal Constitution.

On page 16 of the brief of the defendant in error appears the statement that this court is without jurisdiction to review state judgments where, beside the Federal question decided by the state court there is another and distinct ground on which the judgment can be sustained. We submit that nowhere in its brief has the defendant in error pointed out that other and distinct ground on which the judgment can be sus-

tained. The cases cited by defendant in error in support of its propositions show clearly enough the limitation of the principles stated. A brief consideration of the cases cited on page 16 of the brief of defendant in error will be helpful.

In Kennebeck and P. R. Co. v. Portland & K. R. Co. (1871), 81 U. S., 14 Wall. 23, 20 L. Ed. 850, the Federal question was not raised by the pleadings nor in any of the proceedings, but only appeared in the opinion of the state court. The appellant claimed that a certain foreclosure which it was attacking was void, because that foreclosure was under an Act which violated the freedom of contract, but the Supreme Judicial Court of Maine held the foreclosure was good, without any reference to the Act which was being attacked, but under an earlier Act which was not the subject of attack.

Rector vs. Ashley (1867), 73 U. S., 6 Wall. 142, 18 L. Ed. 733, was decided in the lower court on the ground that limitations had run against the plaintiff and that consequently the Federal question was of no importance.

In Gibson v. Choteau (1868), 75 U. S., 8 Wall. 314, 19 L. Ed. 317, the attempt was made to bring in a Federal question for the first time on an argument filed in support of a motion for a rehearing in the Supreme Court of Missouri, and the Federal Supreme Court refused to hold that that argument was the point on which the state court decided the question.

Klinger vs. Missouri (1871), 80 U. S., 13 Wall. 257, 20 L. Ed. 635. By the Missouri constitution of 1865 a test oath was prescribed to be taken by public officers, jurors, etc., which oath the Federal Supreme Court declared to be unconstitutional. A juror in a

trial for murder in Missouri refused to take the oath, but upon being asked why he refused, he stated not only that he had sympathies with the South during the rebellion and therefore could not take the oath truthfully, but that those were his feelings still, and stronger than ever. He was then discharged from service and the defendant excepted. It was held that his avowed disloyalty to the government was a sufficient cause in itself for discharge, irrespective of his refusal to take the oath, and as it did not appear that he was discharged for his refusal to take the oath, the Federal Supreme Court refused to take jurisdiction in the case.

In Detroit City Railway Co. v. Guthard (1884), 114 U. S. 133, 29 L. Ed. 118, the Federal question relied upon in the Supreme Court of the United States, was not raised at all in the lower courts, though it might have been raised there at any time.

In Hale v. Lewis (1900), 181 U. S. 473, 45 L. Ed. 959, the Wisconsin statute required building and loan associations to deposit with the state treasurer security to a certain amount to be held in trust for the benefit of local creditors. The receiver of a Minnesota building and loan association, which corporation had made the deposit required by the Wisconsin statute by a resolution of its Board of Directors directing such deposit and compliance with the Wisconsin law, prayed that such securities might be turned over to him and the proceeds distributed among *all* shareholders, on the ground that such pledge was a preference of Wisconsin creditors and was in violation of the contract clause of the Federal Constitution. It was held that the contract clause could not be invoked to release these securities from the operation of the

statute, because the stockholders had waived their right to insist upon the constitutional objection by the voluntary act of the Board of Directors in making the deposit with the state treasurer.

In New York Central Railroad Co. v. New York (1901), 186 U. S. 269, 46 L. Ed. 1158, no Federal right was claimed to be violated in the original pleadings and no attempt was made to raise a Federal question until it reached the Court of Appeals, where it was, for the first time mentioned in a brief and not passed on by the Court. The case was decided in the Court of Appeals upon the ground that the charter of the city forbade the raising of the question of benefits to property in a court and the lower courts decided the case on the same ground.

Mobile, etc., Co. vs. Mississippi (1907), 210 U. S. 187, 52 L. Ed. 1016. The following quotation from the opinion will suffice:

> "In the assignment of error in this court the plaintiffs in error have for the first time invoked the Fourteenth Amendment to the Constitution of the United States."

Defendant in error also refers, on page 15 of his brief, to Brooks vs. Missouri (1887), 124 U. S. 394, 31 L. Ed. 454. It is only necessary to say that this court granted a motion to dismiss an appeal in that case because the defendant had not made his motion for a new trial in the lower court within the time allowed by the statute and consequently the Federal question was not an issue.

Garr, Scott & Co. vs. Shannon, 223 U. S. 468:

This was a case to recover a "franchise tax imposed by a State statute."

In addition to the Federal question involved, the decision of the State Court was based upon the *entirely independent* and conclusive local question "that the tax was voluntarily paid."

That case and this are in no sense analogous. Here the Appellate decision was based solely upon the Federal questions involved. All else that was said—*nothing else was decided*—related solely to the effect of the decision of the Federal questions. It did not concern and did not decide any other independent question which, aside from the Federal questions, would, in and of itself, have been conclusive of the controversy, or, for that matter, any other question whatever, its decision of the Federal questions being completely conclusive of the controversy.

This, with one exception, disposes seriatim of all of the cases cited and relied upon by defendant in error in this behalf.

That single exception is the case of Baltimore Traction Company vs. B. Belt R. Co., 151 U. S. 137, cited to the effect "that where a statute providing for condemnation proceedings has been construed by the state courts *as requiring notice* no federal question with respect to due process of law can be based upon the objection that such statute allows condemnation without notice." (Brief of Defendant in Error, p. 14.)

The syllabus of that case upon which the above quoted statement is founded is as follows:

> "When it was objected that a statute of Maryland as to condemnation of lands, violated the U. S. Constitution in that an owner of land could be deprived thereunder of his property without due process of law because the statute did not provide for any notice to him, *and the court of appeals of that state had decided that the statute, properly construed,* required notice, held, that this court is bound by the state decision, and the want of requirement of notice did not exist, and no Federal question is involved."

It is submitted that the foregoing analysis shows clearly the distinction between the case at bar and those cited by the defendant in error in support of its proposition. Upon their behalf, although the plaintiffs in error have no doubt of the jurisdiction of this court, we wish to direct the court's attention to the case of Backus vs. Fort Street Union Depot Company (1898), 169 U. S. 567, 42 L. Ed. 853, where the following language is used in regard to the question of jurisdiction:

> "Inasmuch as the respondents, both in the trial of the Circuit Court and in the subsequent proceedings on the certiorari in the Supreme Court, specifically set up and claim rights under the Federal Constitution which were denied, the jurisdiction of this court is not open to doubt. They again and again insisted that certain provisions of the Federal Constitution, which they named, stood in the way of any further proceedings against them."

The foregoing quotation is from one of the cases principally relied upon and most often cited by the defendant in error and appears to be conclusive on the question of jurisdiction.

The defendant in error refers to Murdock vs. City of Memphis (1874), 87 U. S. 590, 20 Wall. 591, 22 L. Ed. 429. The plaintiffs in error also refer to this case for a careful discussion of the question of jurisdiction and we claim that under the test there applied no doubt remains as to the court's jurisdiction in the present case. Among other things the court says in its opinion in the Murdock case:

> "Or it may be that there are other issues in the case, but they are not of such controlling influence on the whole case that they are alone sufficient to support the judgment.
>
> It may also be found that, notwithstanding there are many other questions in the record of the case, the issue raised by the Federal question is such that its decision must dispose of the whole case.
>
> In the two latter instances there can be no doubt that the judgment of the state court must be reversed and under the new Act (Act of 1867) this Court can either render the final judgment or decree here, or remand the case to the state court for that purpose."

In Myles Salt Company vs. Iberia Drainage District, 239 U. S. 478, 60 L. Ed. 392, the appellee claimed that the judgment of the Supreme Court of Louisiana rested entirely upon an independent question of pleadings under the laws of Louisiana and decided no Federal question. This was a case where under certain state statutes there was a formation by a police jury of a drainage district which included the land of the plaintiffs, whereas the land of the plaintiffs was not where it could by any possibility be benefited by the improvements in jetties which the legislation author-

ized. It was held by the court that there was a Federal question, in that the administration and interpretation of a state act was attacked, though the act itself was not attacked, and further, that the formation of the district for drainage, under the circumstances above stated, was wholly an arbitrary act and not within the powers of the state, because of the Fourteenth Amendment.

We wish once more to emphasize that the record in this case shows a reliance by the plaintiffs in error upon the Federal Constitution, particularly the Fourteenth Amendment thereto, from the very inception of these proceedings and that those provisions have been urged by the plaintiffs in error at every stage of the proceedings, that their rights have been saved by proper exceptions when their contentions were overruled and that in spite of undue consideration given by the lower courts to other aspects of the case, the Federal questions raised by the plaintiffs in error, at the outset, have been and are the controlling and only real questions in the entire record.

SECOND.

CALIFORNIA CODE OF CIVIL PROCEDURE, SECTION 1241, AS AMENDED IN 1913, IS REPUGNANT TO THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

That portion of the statute which is attacked is as follows:

> "Before property can be taken, it must appear:

1. That the use to which it is to be applied is a use authorized by law;

2. That the taking is necessary to such use; provided, when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor; (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury; provided that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, of property located outside the territorial limit thereof." (California Statutes, 1913, page 549.)

As pointed out in the opening brief of the plaintiffs-in-error, it was contended at the trial that if the road laws of California contemplated the institution of condemnation proceedings by such an ex parte resolution of the Board of Supervisors as that which formed the sole basis of these condemnation proceedings and further contended that if the foregoing proviso applied to such a resolution, then the proviso would be unconstitutional as attempting to authorize the taking of property without due process of law, no hearing of

any kind being provided for or accorded to the property owners.

Thus all the vital questions essential to the taking of private property for public use, except only the one question of the amount of damages, could be conclusively determined, and might be arbitrarily determined, by a two-thirds vote of the supervisors, without any notice at all to the land owner and with no opportunity whatever on his part to be heard. The trial court held that the proviso would be unconstitutional if it were given the construction which its language indicates, but then the trial court went out of its way to hold that the resolutions would, without any other proof whatever, establish *prima facie* the facts required to be found by Section 1241. (Tr., Vol. III, Fols. 4032-4039.) But when the case reached the District Court of Appeals, Second Appellate District, that court decided that the statute meant what it said, and when it said "conclusive evidence," it meant conclusive evidence, and not *prima facie* evidence (Tr., Vol. III, Fols. 4287-4289), and the Court of Appeals specifically refused to review the evidence introduced in pursuance of the ruling of the trial court on the question of necessity. (Tr., Vol. III, Fols. 4266-4282.)

There is no question, and it is not denied by the defendant in error, that prior to the amendment of Section 1241, C. C. P., Subdivision 2, by statutes of 1913, page 549, the necessity or expediency of taking private property for a public use was in California subject to judicial inquiry. (See the cases cited page 38 opening brief of plaintiffs in error.)

As we have pointed out heretofore and as defendant in error has not disputed, the express terms of Sec. 1241 state that before property can be taken "it must appear."

The defendant in error has cited a large number of cases supporting, as it claims, the constitutionality of statutes by which the legislature itself, or a subordinate tribunal, conclusively determines the matters enumerated in Sec. 1241 of the California Code of Civil Procedure. While there is authority for the view that the questions of necessity and expediency are exclusively for the legislature, the rulings on this subject are by no means universal and as heretofore pointed out, in California, before the amendment of 1913, and since then to the present case, the law was settled that the question of necessity and expediency was for the court, not for the legislature. Section 1241 itself indicates very clearly that the legislature contemplated that the court should pass upon these matters before the amendment of 1913 went into effect.

It has been pointed out by the plaintiffs in error in their opening brief, and has not been denied by the defendant in error, that in the opinion filed by a judge of the Circuit Court of Appeals, namely in Ennis-Brown vs. Central Pacific Railway Co., *et al.*, 235 Federal 825, the view is taken that the court must determine in condemnation cases whether the use to which it is sought to subject the property is one authorized by law and whether the taking is necessary to such use.

In Ryerson vs. Brown (1877), 35 Mich. 333, 24 Am. Rep. 564, there was before the court a Michigan statute (Laws of 1873, Vol. I, pages 486, 495), which provided for proceedings to obtain a right to flow the land of others for water power mill purposes. That statute was held by Mr. Chief Justice Cooley to be unconstitutional and void, for the reason that there is no such requirement of either general or local public interest

or public policy to be subserved, and no such *public necessity* for the taking of private property as ought to exist to justify the exercise of right of eminent domain. It will thus be seen that when faced with the practical question in a case coming before him for decision this eminent jurist and text writer did not hesitate to decide in his judicial capacity a question of necessity in an eminent domain proceeding.

In Widow Lecoul vs. the Police Jury (1868), 20 La. Ann. 308, the widow applied for an injunction to prevent the county from putting a road across her land. She claimed there was another road in existence connecting the same two points sought to be connected by the road across her property, but that the county had neglected it and had let it get out of repair. Her application for an injunction was denied in the lower court. That decision was, however, reversed in the Supreme Court, the court saying:

> "The projected road would sever the plaintiff's plantation, which would necessarily prove very injurious to her, but this consideration would not have the weight of a feather in the scale if the road through her land was really necessary for public purposes. This we do not consider it to be, whilst there is a state road that could be made passable at all times at less cost than would be incurred in providing the new road."

The similarity of the statement in the case just quoted with the situation disclosed by the record to exist in the case now before the court, is very striking indeed. A careful study of the record brought up by these appeals shows all the circumstances mentioned in the above quotation to exist in the present case. It

appears to be a precedent completely on all fours with the present case, except that it is not complicated by the construction of a lower court that a statute meant something other than what its plain terms state.

If, however, for the sake of argument, it be admitted that the question of necessity is one for the legislature, the position of the defendant in error is in no wise improved. It has cited on pages 28-30 of its brief thirty cases as supporting the constitutionality of statutes by which the legislature itself, or a subordinate tribunal, conclusively determines the matters enumerated in Section 1241 of the California Code of Civil Procedure. It states that those cases are all directly in point. It must be kept in mind that the language of the statute now before the court is that certain resolutions passed by certain bodies in a certain way, shall be "conclusive evidence" of certain things therein contained. It is that statute, so framed and in the language above set out, which must be sustained. The language of that statute indicates very clearly, as we have hertofore demonstrated, that the statute itself contemplates, or did contemplate before 1913, a judicial determination of the questions there raised. Even including the amendment of 1913 the language shows that the legislature contemplated a court proceeding. It is respectfully and earnestly contended that the Legislature has in terms told the court in advance how it must decide a certain class of cases, and it would be hard to imagine any clearer interference by one branch of the Government with the duties of another than such a course as this. All the statutes which were considered by the various courts in the thirty cases referred to by the defendant in error are entirely different from the one now before the court.

In the vast majority of those cases, as careful examination of them will show, the general scheme of the statute was this: That the legislature, or some subordinate local body, or some public service corporation, or some commission, might take certain property for a certain specified public use; that if it were possible to do so, the legislature, the subordinate local body, or the commission, or the officials of the public service corporation should agree with the owner of the property taken as to the price to be paid therefor; that if it was impossible to come to such an agreement then the owner, or the commission, or the officials of the public service corporation might apply to a court which would either itself fix upon the amount of the compensation to be paid, or would appoint a jury, or commissioners, or other officials to determine the amount of compensation to be paid for the property so to be taken.

In no single one of the cases cited by the defendant in error did the statute provide that the court should be conclusively bound by any resolution or act. In other words, adopting the view of the defendant in error, the legislature, in the cases referred to, assumed that the question of necessity was a legislative and not a judicial question and that consequently the court had nothing whatever to do with that branch of the case; but the Legislature of California, in Section 1241, has made or attempted to make, the court subservient to the will of the legislature and to make the judicial function a mere mockery. It has seriously told the court that it shall try a certain question,—not that it has nothing to do with a certain question, and that that certain question is outside of its jurisdiction entirely,—but that it shall take up and consider a cer-

tain question and that it shall decide that question in one way only, namely, the way in which the legislature directs it to decide in the statute. It might be seriously argued that the statute in question was constitutional if it in express terms declared that the legislature or the subordinate body having determined what lands should be taken, the court should decide simply the amount of compensation and whether its use was public. It is not reasonable, it is not consonant with American ideas of constitutional government, and it is not due process of law, or any process of law at all, for the legislature to put into the hands of the court any particular question and then to tell the court in advance how it shall decide the same.

The courts in many jurisdictions have considered in many bearings how far the legislature may go in making any fact or set of facts conclusive evidence of any other fact. We have already referred, in our opening brief, to the article at 10 Ruling Case Law 864 and to the case there cited, namely, Board of Commissioners of Excise v. Merchant, 106 N. Y. 143, 8 N. E. 484. In that case the court had before it Section 12 of the Excise Act of New York (Chapter 628, laws of New York, 1857). In the course of its opinion the court made this important observation:

> "The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party, and thus deny him the opportunity for a trial, would substantially deprive him of due process of law."

In Howard v. Moot, 64 N. Y. 262, New York Court of Appeals states:

> "It may be conceded for all the purposes of this power that the law which should make evidence conclusive which was not so necessarily in and of itself and thus preclude the adverse party from showing the truth, would be void as indirectly working a confiscation of property or a destruction of vested rights."

We quoted in our opening brief from Missouri, etc., Railway Company v. Simonson, 64 Kansas 802, 91 A. S. R. 248, and wish now to quote still further from that opinion as follows:

> "The theory on which all these cases proceed is that an act of the legislature which undertakes to make a particular fact or matter in evidence involving the substantive right of the case, conclusive upon the parties and which precludes inquiry into the meritorious issues of a controversy is an invasion of the judicial process and a denial of due process of law. The legislature may regulate the form and the manner of use of the instruments of evidence—media of proof—but it cannot preclude a party wholly from making his proof. A statute which declares what shall be taken as conclusive evidence of a fact is one which, of course, precludes investigation into the fact and itself determines the matter in advance of all judicial inquiry.
>
> If such statutes can be upheld, there is then little use for courts, and small room indeed for the exercise of their functions."

In a note to People v. Cannon (139 N. Y. 32, 1893), 36 A. S. R. 668, the writer states at page 686:

"Statutes have also frequently been enacted purporting to make one fact conclusive evidence of another, when as a matter of fact the existence of the former is not necessarily connected with the existence of the latter. The effect of such a statute, if constitutional, is to create a liability or cause of action, or of defense where the presumed fact but for the existence of the statutes might be disproved. If, therefore, the fact is one which, in the nature of things, is an essential part of the cause of action or of the right claimed the statute must be unconstitutional, otherwise the power of the legislature to dispense with an essential fact and to create a cause of action where none otherwise exists, must be void, and to affirm this would be to place the rights of all persons within the absolute control of the legislature."

It is contended that the effect of Section 1241 is exactly what is set out in the above quotation, namely, while proceeding under the guise of a judicial inquiry, it places the rights of all persons within the absolute control of the legislature, conditioned only upon the action of two-thirds of the members of the local body in an entirely ex parte proceeding. It is submitted that the mere statement of this situation will indicate a lack of due process of law.

Vega Steamship Co. v. Consolidated Elevator Company, 75 Min. 308, 74 A. S. R. 484. The Minnesota Statute (Section 7675 of the general statutes of 1894), provided that the State Weighmaster's certificate as to weight of grain "shall be conclusive upon all parties, either in interest or otherwise, as to matters contained in said certificate." This statute was held void by the Supreme Court of Minnesota, and the following appears in the opinion at 74 A. S. R. 487:

> "Under the statute, the party running the elevator has no option as to whether or not the State Weighmaster shall weigh the grain; and, in our opinion, the State cannot force an umpire upon such party against his will and then close his mouth so that he cannot show the umpire has made a substantial mistake whether that mistake is the result of fraud, or bad faith or merely of negligence."

In the instant case, the property owner has no right to be heard before the board. The board is made an umpire, but the property owner's mouth is closed when he and the board are before the Court and he is not allowed to state or to prove anything whatever in regard to the action of the board, as evidenced by the resolutions by it passed. It seems that any further comment on this situation is almost superfluous, but there are many other instances, as will appear hereafter, where the courts have made the same or similar statements.

In People vs. Rose, 207 Ill. 352, 69 N. E. 762, the court had before it a statute of Illinois which made certain facts *prima facie* evidence of the loss of corporate powers by Illinois corporations. In holding that such a statute was constitutional the court observed:

> "It is not, however, within the legislative power to declare what shall be conclusive evidence, as that would be an invasion of the power of the judiciary."

Citing Corbin v. Hill, 21 Ia. 70; White v. Flynn, 23 Ind. 46; U. S. v. Klein, 13 Wall. 128; Missouri, etc., Railway Co. v. Simonson, 64 Kans. 802, 91 A. S. R. 248.

In Otis Elevator Company v. The Industrial Commission, 302 Ill. 90, 134 N. E. 19, the court had before it the Workmen's Compensation Law of Illinois as amended by laws of Illinois, 1921, page 446, which provided that in a review by the Circuit Court of the findings of the Industrial Commission, findings of fact made by the Commission shall not be set aside unless contrary to the manifest weight of the evidence. That section was held void as usurping judicial power in attempting to prescribe the rule governing judicial action and determination. The court in that case remarked:

> "Due process of law requires submission to a judicial tribunal for determination upon its own independent judgment as to both law and facts";

citing Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 64 L. Ed. 908.

It will be observed that the California Statute which is the subject of this discussion submits certain questions to a judicial tribunal for determination and then in the same clause proceeds to tell the judicial tribunal how it shall decide both the law and the facts.

The case of Ohio Valley Water Co. v. Ben Avon Borough, referred to, was in error from this court to the Supreme Court of the State of Pennsylvania to review a judgment which, in reversing the decree of the superior court, reinstated a rate-making order of the State Public Service Commission. The Company maintained that the rates which were fixed by the rate-making commission were confiscatory and deprived it of its property without due process of law. The superior court unheld the contention of the company and directed that different rates be prescribed. The

Supreme Court of Pennsylvania, however, reversed that judgment and directed that the original rates fixed by the commission should stand. This court at page 289 states:

> "In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue for determination upon its own independent judgment as to both law and facts, otherwise the order is void because in conflict with the due process of law clause, 14th amendment. Missouri Pacific Railway Co. v. Tucker 230 U. S. 340, 347, 57 L. Ed 1507; 1509; Wadley v. Southern Railway Co. of Georgia, 235 U. S. 651, 660, 661, 59 NE 405, 411; Missouri v. Chicago B. & Q. R. Co. 241 U. S. 533, 538, 60 L. Ed. 1148, 1154; Oklahoma Operating Co. v. Love 252 U. S. 331, 64 L. Ed. 596."

U. S. v. Klein, 13 Wall. 80 U. S. 128, 20 L. Ed. 519. A rider on the legislative, executive and judicial appropriation Act for the year ending June 30, 1871 (16 Stats. 235) provided that when any person has accepted a pardon under the terms of certain amnesty proclamations, such acceptance should be taken and deemed in certain suits in the Court of Claims for the recovery of property or its value "conclusive evidence that such person did take part in and give aid and comfort to the late rebellion," and that on proof of such pardon the jurisdiction of the Court of Claims should cease. In disposing of the constitutionality of that statute this court stated, 20 L. Ed. 526:

> "The legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and

> to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end."

The statute now before the court certainly impairs the judicial authority and directs the court itself to be instrumental to that end.

State v. Schlenker, 112 Ind. 642, 84 A. S. R. 360 holds that a legislature may define what is adulteration of milk, and observes:

> "No doubt the legislature cannot indirectly dispose of a cause by prescribing conclusive rules of evidence and it has no power to direct the judiciary in the interpretation of existing statutes; Groesbeck v. Seeley, 13 Mich. 329; Johns v. State, 55 Md. 362; Reiser v. William Tell, etc., Association, 39 Pa. St. 137; Salters v. Tobias, 3 Paige 338."

Meyer v. Berlandi, 39 Min. 438, 12 A. S. R. 663, the Supreme Court of Minnesota considered the Minnesota Mechanics Lien Law (Laws of 1887 C. 170 Sec. 5); that statute provided that the fact that the person performing labor or furnishing material in the building of a house was not enjoined by law from performing labor or furnishing material, by the person in whom the title was vested at the time, shall, be conclusive evidence that such labor was performed, or material furnished, with and by the owner's consent. The Minnesota court states in 12 A. S. R. 667:

> "A man cannot thus be deprived of his property without his consent. The legislature may doubtless

> establish rules of evidence, but to enact a law making evidence conclusive, which is not so necessarily in and of itself and thus preclude a party from showing the truth, would be nothing short of confiscation of property and a destruction of vested rights without due process of law."

In a California case, which was an appeal from Los Angeles County, Ramish v. Hartwell, 126 Calif. 443, (1899) 58 Pac. 920, the California Supreme Court considered the act of February 27, 1893 (California Statutes 1893, page 33, sec. 4) which provided that a city assessment should be a first lien upon the property affected thereby and that the bonds issued therefor should be conclusive evidence of the validity of the said lien. This section was held to be unconstitutional, the court saying at 58 Pac. 922:

> "It may be regarded as settled that the legislature may make a tax deed conclusive evidence of compliance with all provisions of the statutes which are merely directory of the mode in which the power of taxation may be exercised, but that it cannot make it conclusive evidence of those matters which are essential to the exercise of the power; that as to those steps which are judicial in their nature and without which the powers of taxation cannot be called into exercise such as the listing or assessment of the property, a levy of the tax, some notice of its delinquency and that the property will be sold therefor—the legislature cannot deprive the owner of the right to show want of compliance."

citing Cooley, Constitutional Limitations, page 452.

In Peterslie v. McLachlin, 80 Kans., 176, 101 Pac. 1014 (1909) The Kansas Court considered Section 3

C. 373, page 540 of the laws of 1907. That section made the posting in the office of the county clerk of a copy of a notice of forfeiture of school lands conclusive evidence of proper service of such notice. The court states 101 Pac. 1015:

> "This is a legislative declaration of the truth of facts and an invasion of the province of the judicial department of the Government to which alone belongs the power to inquire whether facts upon which rights exist are true or false. It must be held unconstitutional because it denies to the holder of the original certificate due process of law, and because wrongfully depriving the courts of the judicial power to determine the weight and sufficiency of evidence * * *; where the legislature attempts to make these evidential things conclusive, it passes the bounds of legislative power and invades the province of the court, and in the language of the court in Railway Co. v. Simonson, *supra*, precludes investigation into the fact and itself determines the matter in advance of all judicial inquiry."

This discussion might be continued almost indefinitely, but the cases heretofore referred to indicate with sufficient clearness the view of practically all courts on the matter of the legislature attempting to make certain facts conclusive evidence and thus precluding the court from exercising its usual and constitutional functions. Reference is, however, made to the following cases which are in the same line and to the same effect as those above stated:

Wilson v. Wood, 10 Okla. 279, 61 Pac. 1045;
White v. Flynn, 23 Ind. 46;
Wantland v. White, 19 Ind. 471;

Corbin v. Hill, 21 Ia. 70;
Martin v. Cole, 38 Ia. 141;
Johns v. The State, 55 Md. 350;
Quinlon v. Rogers, 12 Mich. R. 168;
Matter of Stickney, 110 App. Div. (N. Y.) 294;

It will be observed that even in those newer commonwealths where the power of the legislature is for many reasons looked upon with more favor and given greater scope than in the older states of the East and South, the tendency and the universal view seem to be that the legislature may not interfere with the judicial functions of the court by assigning to it a question for determination, and at the same time telling it in advance how that question shall be decided.

As indicating the intention of the Legislature of California that the court should have the right and the duty to inquire into all questions provided for in the original Section 1241, reference is made to the text of Section 1245, California Code of Civil Procedure, being in the same chapter with Section 1241 (Deering 1915 page 577, Kerr page 2745):

> "The clerk must issue a summons which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is sought and a reference to the complaint and descriptions of the respective parcels and a notice to the defendant to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner."

Considerable emphasis is placed by the defendant in error upon the fact that the amendment of November

5, 1918, to the California Constitution was adopted after these proceedings had been begun and while they were still pending. The attention of the court is, however, called particularly to that amendment, which is set out in full at pages 56 to 57 of the opening brief of plaintiffs in error, as indicating beyond any shadow of doubt that the sovereign people of the State of California, not its agents the legislature, but the people themselves, intended and contemplated that the question of necessity in condemnation proceedings should be in the hands of their agents the courts and not in the hands of their agents the legislature. Observations of counsel for defendant in error as to what that amendment may mean but does not say appear to be based on a somewhat weak foundation.

In so elementary a portion of the law as a constitutional amendment it must be assumed that if the people meant their language to have the limitations which counsel for defendant in error place upon it, the people themselves would have made it perfectly plain that when they said "including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law," they, the people, would have expressly limited the application of the provision just quoted to the state of facts to which counsel endeavors to limit it in the brief for defendant in error.

At pages 39-41 of the brief for defendant in error, counsel quote at considerable length from the case of Backus v. Ft. Street Union Depot Co., (1893) 169 U. S. 557, 42 L. Ed. 853, with the apparent intention of proving thereby that the legislature of California had the right to treat property owners, who happen to fall into several different classes, in several different

and wholly arbitrary ways in regard to the conduct of condemnation proceedings regarding their property. It need only be pointed out, we submit, that in the Backus case the party who considered himself aggrieved relied upon the fact that his hearing was being conducted before a common law judge and jury, instead of before simply a jury of inquest. In other words, he was in that case objecting because he was receiving greater safeguards than he had received under the old laws. In this case the plaintiffs in error are contending and have contended throughout that the safeguards allowed them under the old laws of California were deliberately and arbitrarily withdrawn from them, and that they are receiving not only less consideration, but no due process of law under the present system to which they are being unwillingly subjected. It is to be noted that counsel at page 37 of the brief for defendant in error have been forced into the position, by the previous holdings of the California courts, of saying that even though the California courts may have uniformly held in the past that necessity was a question for the court it can make no difference in this case and to the plaintiffs in error, because, forsooth, the District Court of Appeal in California decided that in this particular case it was a question for the legislature and not for the courts. As has been indicated heretofore and as will be pointed out in greater detail in a subsequent section of this brief, this is only one instance in which it appears that this case was treated and considered by the California courts in a manner entirely different from its previously established practice in other cases.

The phrase "due process of law," as used in the Federal Constitution, is the equivalent of the "law of the land."

Murray's Lessee v. Hoboken, 18 How. 272, 278;
Davidson v. New Orleans, 96 U. S. 97, 101;
Missouri Pacific Ry. Co. v. Humes, 115 U. S. 512, 519;
Scott v. City of Toledo, 36 Fed. Rep. 385, 39[illegible];
Cooley's Constitutional Limitations, 432.

The words "due process of law" have the same meaning in the Fifth as in the Fourteenth Amendment to the Federal Constitution.

Hurtado v. California, 110 U. S. 516.

"Due process of law, within the meaning of the amendment" (the Fourteenth Amendment being here considered) "is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

Giozza v. Tiernan, 148 U. S. 657;
Hurtado v. California, 110 U. S. 516, 535;
Caldwell v. Texas, 137 U. S. 692, 697;
Leeper v. Texas, 139 U. S. 462.

"Purely arbitrary decrees or enactments of the Legislature directed against individuals or classes are held not to be "the law of the land" or to conform to "due process of law."

McGehee on Due Process of Law, p. 60.

A classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560;

Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 165; Cotting v. Goddard, 183 U. S. 79.

We will close this branch of the discussion by the following quotation from the Supreme Court of Oklahoma in Board of Education of City of Stillwater v. Aldridge, 13 Okla. 205, 73 Pac. 1104:

> "When the legislature prescribes the mode by which property may be taken for public use, notice of the proceedings for condemnation must be provided for, to be given to the party whose property is taken or injuriously affected, in order that he may have an opportunity to be present and protect his rights at some stage of the proceedings, and in order to ascertain the proper measure of compensation to which he is entitled. If such notice is not provided for, the law is void."

THIRD.

PLAINTIFFS IN ERROR WERE DENIED THE EQUAL PROTECTION OF THE LAW.

As was pointed out at pages 92 and 93 of the opening brief of plaintiffs in error, in California the question of what lands are necessary to be taken in the exercise of the right of eminent domain is expressly made a judicial question, not only by the Code sections cited, but also by the amendment of November 5, 1918, to Article 1, Section 14 of the California Constitution, which amendment has been referred to in this brief and which is set out in full in the opening brief for plaintiffs in error at pages 56-57. As pointed out by us at page 93 of our opening brief, the legislature, when it attempted to make the ex parte resolutions of a political sub-division conclusive evidence as to these essential facts, without any hearing whatever being provided for, had the effect of depriving

plaintiffs in error of their property without due process of law and denying to them the equal protection of the law, since by well settled practice all judicial questions must be determined by the courts upon competent evidence and without a previous direction of the legislature as to what particular form of evidence should not be in any wise disputed.

It is interesting to note that the lower court held that the resolutions referred to were only *prima facie* evidence, it not being possible, apparently, for the judge of that court to go the length which the legislature had gone and to deny to the plaintiffs in error any hearing whatever upon these questions. The action of the lower court in so holding does not strengthen in the slightest, we submit, the position of the defendant in error, for what the lower court did was a matter of grace and not a matter of right. Consequently the ultimate decision rested upon the effect given to the resolutions, heretofore referred to, by the District Court of Appeals. The Court of Appeals, unlike the judge in the trial court, was prepared to go the full length which the legislature had gone and to hold that the statute meant exactly what it said and consequently, in spite of the apparent desire of that court to escape a direct decision upon the constitutional question involved, the question is nevertheless raised and is before this court, and the decision of the Court of Appeals had the undoubted effect of denying to the plaintiffs in error the equal protection of the law.

As has heretofore often been held and as is substantiated by the authorities cited by us at pages 94-95 of our opening brief, it is not enough that the owners may by chance or by favor have a hearing, the law must require notice to them and give the right to a hearing. And as to the question of constitutionality,

it makes no difference that a hearing of some sort was granted by the lower court as a matter of grace upon the question of necessity, when as a matter of fact the law provided for no such hearing. In other words, it is the law itself which is the subject of investigation, not the interpretation, however unreasonable, which may have been placed upon the law by a court which did not feel justified in giving the law its actual and apparent force and effect. Reference is again made to Stuart v. Palmer, 74 N. Y. 183; Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 768.

The State of California itself had repeatedly decided, as pointed out by us in the authorities cited at pages 95-97 of our opening brief, that the invidious distinctions and the character of the proviso of Section 1241 were unconstitutional. The reference of counsel for defendant to this fact appears to be an attempted plea in confession and avoidance. He admits that such was the law in California but states that the Court of Appeals decided otherwise in this case. This is merely another instance of the peculiar necessity which the Court of Appeals appeared to feel to overrule this and other practices in California theretofore long established, in order to place the decision of this case upon grounds other than a consideration of the Federal questions involved.

In view of the fact that the distinctions between the various classes of property owners considered in Section 1241 appear to counsel for defendant in error to be so utterly harmless, it is well to restate here what we stated in the opening brief.

The Section singles out the landowner who owns land in a certain locality when the resolutions of a certain political sub-division of the state is adopted by a two-thirds vote of its governing body and denies

to such land-owner any hearing whatever upon the vital facts catalogued in the said section, whereas to all other persons whose land may be condemned for public purposes there is accorded a hearing by the court without any presumptions whatever against them. "They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute." Gulf, etc. Ry. Co. v. Ellis, 165, U. S. 170, 41 L. Ed. 666.

It is to be noted that counsel for defendant in error do not, apparently dispute the application of the authorities which we cited in our opening brief on this particular question, but they simply collect other authorities, which, we submit, will be found, upon inspection, to be of no application to the case at present before the court.

Our contention in this behalf is strongly exemplified and supported by some of the authorities cited and quoted in the brief of defendant in error. This we will illustrate by a few excerpts:

> *"The protection which the organic law affords a citizen against arbitrary discrimination in favor of other citizens, or a particular class of citizens arbitrarily selected, is the same thing in the Constitution which forbids the sovereign power to take the property of the citizen for private purposes at all, and which affords the guaranty of the equal protection of the laws."*
>
> Southern Railway Co. v. Memphis, 126 Tenn. 267. (Brief of Defendant in Error.)

This is precisely what we contend, and is the precise principle which the obnoxious proviso violates.

In Cincinnati Street R. Co. vs. Snell, 193 U. S. 30 (cited by defendant in error at pages 52 and 53 of its

brief), the objection was that "the state has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the same forum, *although as to both persons the law has afforded a forum in which the same and equal laws are applicable and administered.*"

Here certain classes are accorded a hearing before a competent *judicial* forum, while the class to which the *proviso* in question relegates the Plaintiffs in Error is denied any hearing of any kind or before *any forum whatever.* In the one instance the property *if taken* (which the Court must determine) is taken *judicially,* in the other, without any determination of any judicial body whatever or any hearing of any kind or character, it is taken *arbitrarily.*

In the same case it was emphasized that the situation presented "*a condition where fundamental rights are equally protected and preserved,*" although "protected and preserved" in different forums.

Here in certain classes fundamental rights of the property owners are protected and preserved by the safe bulwark of a judicial hearing; in another class—unfortunately ours—there is no protection or preservation of any rights by any kind or character of hearing whatever.

Then, again, in that case it was said: "It is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best *to provide for a trial in one forum or another.*"

Here it is palpably obvious that our rights were not thus or at all protected or preserved because as to us the State provided for no trial of any kind in any forum.

Finally, this Court quoting from one of its earlier decisions, the quotation by Defendant in Error, from the opinion in question concludes: "But it is clear that the 14th Amendment in no way undertakes to control the power of a state *to determine by what process legal rights may be asserted or legal obligations be enforced,* provided the method of procedure adopted for these purposes *gives reasonable notice and affords fair opportunity to be heard before the issues are decided.* This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another."

We think it equally clear that the 14th Amendment to the Constitution of the United States does undertake to control the power of a state when such state fails as to one class to provide any process by which "legal rights may be asserted or legal obligations be enforced," and fails to adopt any method of procedure which "gives reasonable notice and affords fair opportunity to be heard before the issues are decided," while as to other classes, not differently situated in any real or fundamental sense, it does afford all of these constitutional rights and legal protections.

In Pittsburgh, etc. R. Co. v. Backus, 154 U. S. 421 (cited and quoted at pages 53, 54 and 55 of brief of Defendant in Error), this Court said: "*If a single hearing is not due process,* doubling it will not make it so, and the power of a state *to make classifications in judicial or administrative proceedings* carries with it the right to make such a classification as will give to parties belonging to one class *two hearings* before their rights are finally determined, and to parties belonging to a different class only *a single hearing.*"

With this we have, and we could not legitimately have, any quarrel. One full, fair hearing is all that anyone can legitimately demand. But the Plaintiffs in Error here, accidentally falling into the two-thirds vote class of the pernicious *proviso* in question, were not even accorded—and according to the California District Court of Appeals were not even entitled to—"a single hearing."

True the *lower Court*, with an eminent sense of justice (limited herein by its views as to the *prima facie* effect of the resolution of intention) did attempt to accord the plaintiffs in error a sort of burden-bearing hearing, but even this was, in actual legal effect, disregarded by the Appellate Court and swept aside by that Court as "immaterial."

So in Kentucky R. R. Tax Cases, 115 U. S. 321 (cited and quoted from at pages 55 to 59 of brief of Defendant in Error) it is said: *"The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."*

Here (and this we submit with the utmost confidence of its unquestionable soundness) all *owners of property* which is sought to be condemned for a given public use stand in exactly the same "similar circumstances" before the law; the vote of one supervisor or other member of a municipal body upon the necessity of taking private property for a public use does not and cannot alter or change the legal status of any such property owner. Therefore, as all such property

owners are naturally and irrefutably in the same class as to their property rights and their rights to protect their property rights, the *proviso* which we are considering most emphatically does not "operate equally and uniformly upon all persons in similar circumstances."

And in an early and well considered case the Supreme Court of California held a statute to be unconstitutional which imposed different precedent conditions upon the cities of the fifth and sixth classes, before the right to condemn property for certain purposes could be exercised, on this point saying:

> "It seems to us perfectly clear that the clause of the incorporation act requiring cities of the fifth and sixth class to make an effort to agree, while all other persons are exempt from such condition, is in plain and direct conflict with both of these constitutional inhibitions. It destroys the uniform operation of a general law, and is special in a case where a general law not only can be made applicable, but in which a general law had been enacted, and in which there is no conceivable reason for discrimination." City of Pasadena v. Stimson, 91 Cal. 238, 28 Pac. 604.

This case sustains in principle the contention of plaintiffs in error now under consideration, for if the invidious limitation upon the right to take property rendered that statute void, a fortiori should the more important and invidious distinction made in the proviso to section 1241 C. C. P. render that statute void, when challenged by the owner whose property is being taken. In other words, the courts should be at least as

diligent in protecting private property from an illegal taking as in promoting the taking of private property for public purposes.

It seems unnecessary further to pursue this subject; for nothing could possibly be more unjust, unequal, unreasonable or a greater denial of equal justice than the denial to one set of persons of a right to *any hearing* upon a vital question of property rights while according to other sets of persons *similarly situated in every respect* the right to a full *judicial hearing upon the same identical questions.*

This goes much further than the possible right (which we do not concede) to deprive *all equally situated* of a hearing; for that is not the case.

We feel apologetic for thus restating and thus further urging so plain a consequence.

The Legislature of California Has Entrusted the Matter of Condemnation to Its Judiciary.

According to the decision of the District Court of Appeal in these cases, the Legislature of California has provided at least two distinct methods of procedure for acquiring private property *by a county* for public road purposes, viz: One by what is commonly known as the "viewer" method, where the property owner is accorded a full opportunity to be heard before the Board of Supervisors; and the other initiated by a direct *ex parte* resolution of that Board.

Upon this matter, the District Court of Appeals in deciding these cases said:

"Appellants insist that such rulings constituted fatal error for the reason that the powers conferred by law upon the board of supervisors to establish public highways are those *only* embodied in sections of the Political Code numbered 2681 to 2689, inclusive, which procedure therein prescribed is designated the "viewer" method and not infrequently adopted by counties in acquiring lands for highways; hence the resolutions of the board of supervisors authorizing the condemnation suits were not sufficient to confer jurisdiction upon the trial court, from which fact it follows that all proceedings had pursuant to such resolutions were void, including the commencement of the actions and the judgments and orders appealed from. It is unnecessary to enter upon an extended discussion of appellant's voluminous brief and argument in support of this point. Suffice it to say the identical question, involved in the case of *Adamson v. County of Los Angeles,* reported in volume 34, California Appellate Decisions, page 888, was decided adversely to appellants by the District Court of Appeals for the First District, and a transfer of the case denied by the Supreme Court. In that action Adamson, as a taxpayer, set forth in his complaint the proceedings had and taken by the board of supervisors in the acquisition of the property in question, and, insisting the entire proceedings for condemning the same were unauthorized and void, sought to have the county enjoined from proceeding with construction work in the 'Main Road' case. In deciding the case the court said: '*The provisions of article VI of chapter 2 of title VI of the Political Code, comprising sections 2681 to 2698 thereof,* do not purport to be exclusive, and may not be held to be so in view of the express grant of power *embodied in sub-division 4 of section 2643 above quoted,* and of the even more comprehensive enumeration of the gen-

> eral permanent powers of boards of supervisors *contained in section 4041 of the Political Code by which* such boards are expressly authorized 'to acquire and take by purchase, *condemnation* or otherwise land for the uses and purposes of public roads, highways and so forth.' The contention of appellant in the Adamson case was identical with that here urged; the argument of appellant there was identical with the argument made in the instant cases; and the adverse decision of the court in that case must be deemed determinative of the same question presented in these appeals." (Trans., pp. 1422-4.)

In other words, the proceedings in the cases at bar were taken under the authority held to have been conferred upon Boards of Supervisors by Sub-division 4 of Sections 2643 and 4041 of the Political Code, which, as also held by the State Appellate Court, contemplated and authorized a procedure different from and independent of the "viewer" method prescribed by Article VI of Chapter II, Title VI of that Code.

So much of Section 2643 of the Political Code of California as is pertinent here, is as follows:

> "The boards of supervisors of the several counties of the state shall have general supervision over the roads within their respective counties. They must by proper order: * * *
>
> "4. *Acquire the right of way over private property for the use of public highways,* and for that purpose require the district attorney to institute proceedings, under title 7, part 3, of the Code of Civil Procedure, and to pay therefor from the general road fund or the district road fund of the county."

So much of Section 4041 of said Political Code, as is pertinent here, is as follows:

> "The boards of supervisors, in their respective counties shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law: * * *
>
> "4. BUILD ROADS. To acquire and take by purchase, *condemnation* or otherwise land for the uses and purposes of public roads, highways, boulevards, turnpikes, and other public ways, and to lay out, maintain, control, construct, repair, and manage public roads, boulevards, highways, turnpikes and other public ways, and to incur a bonded indebtedness for any such purposes; * * *"

Both of the Sections quoted in this behalf contemplate the acquisition of the property sought by "*condemnation*"—Section 2643 expressly by "proceedings under Title 7, Part 3 of the Code of Civil Procedure," and Section 4041 inferentially by similar proceedings, as the portions of the Code of Civil Procedure referred to constitute the only provisions in the laws of California for "condemnation" proceedings.

Title 7, Part 3 of the California Code of Civil Procedure embraces Sections 1237 to 1264 of that Code, both inclusive, and including, of course, Section 1241 and its specific and questionable *proviso* in Sub-division 2 thereof; and prescribes a *purely judicial* procedure for determining the various issues involved in any proceeding for the condemnation of private property for public use.

Therefore, the proviso added to Sub-division 2 of Section 1241 of the Code of Civil Procedure in 1913, should not be construed as an enactment into the *judicial* proceeding of an arbitrary *legislative* mode of

taking private property for a public use, but as an attempted injection into the *judicial* proceeding provided *of a rule of evidence* to be applied, under the discriminatory circumstances prescribed, in the *judicial* consideration by the Court of the issues entrusted to it by the Legislature.

Thus construed, according to its clear intent, as exemplified by the history of condemnation procedure in California, it is demonstrably unconstitutional under the authorities cited and discussed at length at pages 38, *et seq.*, of our opening brief. No repetition of those authorities, nor the citation of any additional ones to the same effect is necessary. They are clear, convincing and conclusive.

The California Code provisions prescribing the *judicial* procedure in eminent domain, *to which all statutory provisions of this state concerning the acquisition of private property for public use lead, and which must be ultimately conformed to before any private property can be condemned for public use,* with the exception of the indefensible *proviso* of 1913, have been substantially the same since their original enactment.

Section 1241 of the California Code of Civil Procedure, as enacted in 1872, when the California Codes were adopted, reads as follows:

> "FACTS NECESSARY TO BE FOUND BY COURT BEFORE CONDEMNATION. Before property can be taken, it must appear:
>
> 1. That the use to wnich it is to be applied is a use authorized by law;
> 2. That the taking is necessary to such use;
> 3. If already appropriated to some public use,

that the public use to which it is to be applied is a more necessary public use."

Sub-divisions I and II remained as enacted, without amendment until 1913, when the offensive *proviso* was added attempting to *prescribe a rule of evidence* FOR THE COURT in its *judicial* consideration and determination of *the necessity for the taking.*

That is, practically from the beginning of things in California, *even before the adoption of the present California Constitution of 1879,* the Legislature entrusted *to the Courts,* and has ever since *left with the Courts,* the power *judicially* to determine this vital question and the issues bearing upon it.

The only effect of the *proviso* of 1913 was not to deprive the Court of its *jurisdiction* in this behalf, but merely to prescribe—or attempt to prescribe—for it a *rule of evidence* to be followed in determining the questions entrusted to it under the certain peculiar segregated circumstances mentioned in the *proviso.* Except in this particular *restricted instance* named in this *proviso,* the unlimited and unrestricted power to judicially hear and determine all of these issues remains with the Court.

The Constitution of 1879 continued in force "until altered or repealed by the Legislature" all laws "not inconsistent therewith." (Sec. I, Art. 22, California Constitution.)

Thus this *judicial* power conferred by the Legislature upon the Courts in matters of eminent domain was continued in force by that Constitution.

It therefore became and is fundamentally embedded in the laws of this State pertaining to the taking of private property for public use; and its continued ex-

istence was and is recognized by and definitely embedded in the California Constitution by the Amendment of November 5, 1918 (Sec 14 of Art. I of that document) which expressly provides for security against damages for the taking of property for a public use when there is "an *adjudication* that there is no necessity for taking the property."

It is true that this Amendment was adopted after the commencement of this action, which was commenced on October 14, 1916 (Trans. Fol. Page 44), but it was adopted before the commencement of the trial of these cases and was in full force at the time of their trial, and irrespective of the date of its adoption it is a constitutional recognition by the people of the State of California of the *judicial* nature of the condemnation proceedings confided by the Legislature throughout the legal history of California to the Courts.

FOURTH.

THE STRIKING OUT OF THE SPECIAL DEFENSES PREVENTED THE PLAINTIFFS IN ERROR FROM RAISING THE QUESTION WHETHER THE LAND SOUGHT TO BE CONDEMNED WAS BEING TAKEN FOR A PUBLIC USE AUTHORIZED BY LAW.

The theory upon which the Defendant in Error builds its argument upon this branch of the case appears to be this: The Plaintiffs in Error were allowed to introduce evidence bearing on the question of public necessity for the projected public improvement; therefore,—regardless of what else may have taken place at the trial, regardless of what rulings may have been

made upon the pleadings,—because Plaintiffs in Error were allowed to introduce the evidence above referred to, they were accorded every right to which they are entitled. It might be well to look again to the record upon this point. At the very outset of the proceedings Plaintiff in Error, May K. Rindge, set up as a separate defense matter which alleged in substance that the road sought to be condemned is isolated; that it is wholly within the boundaries of what is practically one property; that it is not necessary for the use of, nor desired by, but strenuously opposed by the owners of such property and that "IT COULD AND WOULD AFFORD NO REAL OR GENUINE SERVICE TO ANY PART OF THE PUBLIC FOR ROAD PURPOSES IN ANY TRUE SENSE OF SUCH PURPOSES and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel; that the condemnation would be for private purposes and in contravention of the provisions of the Constitution of the United States and particularly in violation of the Fourteenth Amendment to said Constitution and would be void and without due process of law and would constitute a denial to the defendants of the equal protection of the law." (Tr., Vol. I, Fols. 303-315.)

Upon motion of the Defendant in Error the Court struck out these defenses, upon the ground that all of the matter asked to be stricken out, and each of the separate matters, are irrelevant and immaterial and constitute mere surplusage and conclusions of law of the pleader and none of the matters asked to be stricken out are matters of fact, ultimate or otherwise, nor are any of them allegations upon which the Court would have the right or the power to admit or receive evi-

dence. (Tr., Vol. I, Fols. 653-56; Tr., Vol. I. Fols. 303-315.)

Counsel for Defendant in Error state on page 69 of their brief that Plaintiffs in Error do not claim that the evidence demonstrates that the proposed undertaking was for a private use, nor that Plaintiffs in Error were denied the right to prove that the use was not public, nor that defendant in error did not prove that the use was public. Counsel then go on to state that because Plaintiffs in Error were given every latitude in an attempt to prove that the use was private, consequently Plaintiffs in Error are in no position to complain merely because their attempt was unsuccessful. At this point there is a sharp feature of the case which appears to overshadow nearly all the others. Counsel for Defendant in Error seem to lose sight of the fact that the Court, before any evidence was admitted on the question raised by the special defenses stricken out, had stated in advance that any such evidence was immaterial and irrelevant. Can it be seriously contended for a moment that the mere introduction of evidence, after such a ruling as that, which was early made in the case, could by any possibility accord to the Plaintiffs in Error the rights to which they are entitled? The Defendant in Error is obliged to take one side or the other of this position. It cannot occupy both sides. If the special defenses were in fact immaterial and irrelevant, then no evidence whatever should have been received under them. If the special defenses did contain matter which was relevant and material then they should have remained in the record. But it is not and cannot be, and, we submit, never has been due process of law, or at all consonant with the Anglo-Saxon system of jurisprudence, that the Court should state in advance that

certain evidence would not be considered, should later receive that evidence without changing its form or ruling in any respect and then be allowed to take the position and maintain it that its action in receiving the evidence accorded to the party originally setting up the pleading, which was stricken out, every right to which he was entitled.

On page 70 of their brief counsel quote from the opinion of the District Court of Appeals a portion which states that every material issue tendered by the so-called separate defense was raised by the pleadings which remained in the record and that in the trial defendant (Plaintiffs in Error) were accorded every opportunity, of which it availed itself, in offering evidence touching every matter contained in the pleadings so stricken out by order of the Court. Counsel then proceed as follows:

> "The state court having found the fact to be as stated in this quotation, this court will accept such statement as true."

We submit that a careful study or even a single reading of the opinion of the Court of Appeals will indicate not that the Court of Appeals found the facts above stated to be true but simply that the Court of Appeals, because it held that Section 1241 meant what it said and that the resolutions were conclusive evidence, merely and explicitly refused to review the evidence introduced in pursuance of the rulings of the trial Court on the question of necessity. (Tr., Vol. 3, Fols. 4266-4282.)

Defendant in error goes on to state that the questions of necessity and of public use were issues under paragraphs three and four of the Complaint, paragraph

three of the amended answers of May K. Rindge and Rindge Company and the special defense which remained in the pleadings.

In this connection it has been thought advisable to set out in full the issue which was framed and upon which the hearing proceeded and also the issue which was offered and refused.

Reference is made to Transcript, volume 1, folios 48-50, 288-291, 324-327, 301-302, 337-338.

THE ISSUE FRAMED.

Complaint.	*Answer.*
III.	III.
That it is necessary for county purposes, and the public interest, convenience and necessity requires the acquisition of an easement in and over the properties hereinabove particularly described for the establishment and maintenance of a public highway as prayed herein.	That she denies that it is necessary for county purposes or purposes whatever, or at all, or that the public or any interest or convenience or necessity or either requires the acquisition of an or any easement in or over the properties, or any part or portion thereof, described in paragraph II of the said complaint for the establishment of a public or any highway either as prayed for in said complaint, or otherwise at all.
	Separate Answer and Defense.
	IX.
	That she is informed and believes, and upon her in-

formation and belief alleges, that there has been no consideration nor determination by the Board of Supervisors of the County of Los Angeles, State of California, of any of the matters or things alleged in the complaint herein as amended, and particularly of the matters and things alleged in paragraph II of said complaint as amended, and that the said alleged resolutions, referred to in paragraph II of the said complaint as amended, were arbitrarily adopted by the said Board of Supervisors of Los Angeles County, without any consideration of the matters or things therein contained, and without the exercise of any discretion therein, and well knowing that there was no room for the exercise of any discretion therein, but on the contrary knowing full well that all of the property proposed to be taken for a public road and highway and to be condemned as said resolution set forth and as in said complaint as amended alleged was not, and could not be, necessary for any public use of any kind or char-

acter whatever and particularly in this, that it is located wholly and solely upon and within the confines of private property and cannot under any circumstances afford any accommodation of any kind or character to the travelling public, or any part or portion thereof, and that, therefore, the taking of the same for any alleged highway purposes would be without due process of law and in violation of the provisions of the Fourteenth Amendment of the Consitution of the United States, and that the taking of said property under said resolutions for a public highway or other purposes would be void, and would be a denial to this defendant and the ultimate owners of said property sought to be condemned of equal protection of the laws under the Constitution of the United States, and would contravene the Fourteenth Amendment to the said Constitution of the United States.

THE ISSUE OFFERED AND REFUSED.

VI. of the further and separate answer and defense: That there was not at the commencement of this action, and is not now, any public road or way of any kind or character either upon that portion of said Malibu Ranch located in Los Angeles County or upon that extension of the same in Ventura County; and that the said proposed road or highway sought to be condemned and taken would be located wholly and solely upon that portion of said Malibu Ranch situated in Los Angeles County, would end and terminate upon the private property of defendant Rindge Co. at the Ventura County Line; would have no laterals or outlets or feeders of any kind or character; would be located wholly and solely, and give access wholly and solely to the private ranch property the defendants May K. Rindge and Rindge Co.; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel.

It will be seen that a definite specific issue was tendered and refused as to the real character of the use of this road and that the court, by its ruling, took the ground that no evidence under that issue would have any effect upon the court's decision. It will be observed that there was not left anywhere in the record any issue as to the road in question being located wholly upon one property and that there is left nowhere in the record an issue as to whether the alleged road would or could furnish any way of necessity or convenience to the general public or for public use or travel.

Paragraph 14 of the amended answer and separate defense, which was allowed to remain in the record, does not make an issue upon this point but only upon whether or not the Board of Supervisors had any knowledge of the facts therein set out.

It is, of course, elementary that there must be a clear record in all proceedings and it is one of the elements of due process of law that such a record be had. There is a doctrine long embedded in Anglo-Saxon jurisprudence, called the Doctrine of the Prescriptive Constitution, to the effect that there can be but one record of a proceeding; that that record is jurisdictional and that if the record is not the right record jurisdiction has failed entirely. As has several times before been stated by us in our brief, there is no record hereunder which the court would be under the slightest duty or have any right to enter into consideration of any evidence upon the issue of whether this road was not in fact a public road, or to give any judgment thereon. The fact that evidence was heard, we submit, does not cure the error, since the court had in advance declared that such evidence

would be immaterial and irrelvant and that consequently the court must be assumed to have considered such evidence when it was introduced.

Counsel for the defendant in error, with apparent earnestness, refer to Section 1238 of the Code of Civil Procedure of California, as indicating that the power of eminent domain may be exercised in behalf of the following public uses: * * * Highways. There is not and cannot be any dispute as to that, but there has been throughout this case, in every court in which this case has been heard, a very clearly cut dispute as to whether this particular road was a highway. It has been throughout the contention of the plaintiffs in error that it was not a highway, that it was not a public utility, but that it was a private utility. Courts are a part of our political organization for certain specific purposes. One of the purposes of their existence is the determination of just such a question as this. The court of first instance in California declined to have any issue upon this matter, denied the plaintiffs in error not only due process of law, but any process whatever in regard to that particular and most important question. A history of this entire matter, as set forth in the record, and particularly as referred to in the statement of the case of this reply brief, shows beyond any doubt what the situation was and is in regard to the Malibu Ranch. The County, State and Federal authorities have been endeavoring since December 3, 1907, to accomplish one object, namely, a road from Santa Monica, which is near the eastern boundary of the Malibu Ranch, into, through and over the said Ranch to the Ventura County Line, where the road will terminate in a private property, being property of plaintiffs in error in Ventura County. Two separate suits were brought by the state authori-

ties and by the Federal authorities, respectively. Each of these suits terminated, after long litigation, in favor of the plaintiffs in error, one in 1913, one in 1917. Yet before the suit in the state court was terminated by a decision in favor of the plaintiffs in error on April 7, 1917, the County of Los Angeles had started these condemnation proceedings, in pursuance of the *ex parte* resolutions passed in August, 1916. Particular and earnest reference is made by the plaintiffs in error to the opinion of the state court in People v. Rindge (Tr., vol. Fols. 837-903) and to the opinion of the United States District Court in U. S. v. Rindge (Tr., Vol. I, Fols. 759-837).

It is claimed by the plaintiffs in error and is not disputed that those few persons who now occupy lands in the mountains to the north of the Malibu Ranch and to the west of the Malibu Ranch, took up those lands in the interval between 1905 and 1917 and proceeded through and across the Malibu Ranch to reach those lands, at a time when it was impossible for the owners of the Malibu Ranch to prevent such passing across their property, because either the state court or the Federal court, or both courts, had injunctions in force against the plaintiffs in error which made it absolutely necessary for them to allow such persons to come and go across the Ranch property (Tr., Vol. I, Fols. 741). The true nature of this entire proceeding can best be understood by a careful reading of the opinion of the court of first instance on the question of necessity (Tr., Vol. III, Fols. 426-472). Special attention is directed to Folios 4065-4067:

> "If for no other purpose than to afford outdoor life and recreation to the people of Los Angeles

County by a scenic highway we believe the proposed Malibu road to be a public necessity. As proposed said road traverses a stretch of land the natural beauty of which is unique and diverse. To the south can be seen the broad Pacific, with its variegated waters and many shaped islands, while immediately to the north stand the majestic Santa Monica mountains; up hill and down dale the road winds its way through wooded canyons and across verdant mesas, ever revealing to the traveller a panorama of rare charms. It is easy to conceive the pleasure of recreation and the incalculable benefit that will be afforded the public by the building of this main Malibu Road. A public necessity for a road may exist although the road may serve no purpose of business or duty. It is sufficient that it is an exigency for the exercise of a lawful public right, although it be only for the purpose of amusement and recreation, as a way for travel to a public park or common, to a place of historic interest or remarkable or pleasing and natural scenery."

This is in the face of the fact that there is not a line of testimony in the entire record showing, or claiming or indicating that the purpose of the county in condemning this road was to make accessible to the population scenic beauties. It seems to follow as a necessary conclusion, from the opinion of the court of first instance, and from the entire record, that this road is being condemned over the Malibu Ranch, not for the purposes of serving the public or for any purposes of travel or for connecting with any other roads, but simply to have a drive into the Ranch and a drive out. In other words, it is making the Ranch a park without paying for it as a park. It is taking property of the plaintiffs in error for park purposes, under the guise of taking only a portion for highway purposes,

and it is taking the property of the owners of the Ranch without any process of law whatever.

Pleadings are the judicial means of investing a court with jurisdiction of a subject-matter to adjudicate it. The elemental foundation is stated in the ancient maxim of the Roman law, "*De non apparentibus et non existentibus eadem est ratio.*" (What is not juridically presented cannot be judicially considered, decided or adjudged.) The application of these principles to the present case will demonstrate that the court of first instance, as appears from the record and the pleadings, and particularly from the quotations from the pleadings hereinabove set out, never had before it for decision the question which we are now discussing, namely, whether or not the so-called road or highway was in fact a road or highway, or merely a sham and a pretense. There is in the record at the present time merely an allegation by the county, and a denial by the property owner that the public interest, convenience and necessity require the acquisition of an easement over certain named property. The pleadings which were set up by the plaintiffs in error and which were stricken from the record by the court set out in detail facts, not conclusions of law, which facts, if true, would have constituted a demonstration that the alleged road was not in fact a road but only a sham and pretense. It cannot be too strictly emphasized that the action of the court in striking out those pleadings left no issue on the most important question in the case. Consequently the court had no jurisdiction whatever to give any decision upon that question for the pleadings are jurisdictional and the observations off and outside the record, which any court may choose to make, are not effectual as binding

the parties to the suit. The only issue left in the pleadings when the court had disposed of the motion to strike out, was the one which might have been satisfied by proving that the proposed improvement was a highway because the legislature called it such, but there was not left in the pleadings, the mandatory record, anything which the court could use as a basis for the determination of the question which it later undertook to decide, namely, that the road planned to be built across the owners' property would and could furnish any way of necessity or convenience to the general public or for public use or travel, because that issue was tendered by the plaintiffs in error and was deliberately refused by the court when it granted the motion of the defendant in error to strike that defense from the pleadings.

> "Due process of law is the exercise of administrative power, according to certain fixed and fundamental principles. Due process of law in judicial procedure is the establishment of judgments and orders in proceedings conducted upon fundamental principles of procedure, these proceedings being properly evidenced by the right of record." Equity in Procedure, William T. Hughes, 1911, p. 35.

Citing Windsor v. McVeigh, 3 Gr. & Rud; 93 U. S. 274; Rushton v. Aspinwall, 1 Smith's Leading Cases (Edition of 1885), 1445; Doug. 679, 99 Eng. Reprint 430; Nalle v. Oyster, 230 U. S. 165, 57 L. Ed. 1439.

In Clark v. Dillon, 97 N. Y. 370 (1884), the complaint alleged in substance that the defendants excavated a pit in a city street and left the same unguarded, by reason of which the plaintiff's wife fell in and was injured. The answer contained three de-

fenses: First, contributory negligence; second, settlement and compromise; third, a denial of each and every other allegation in the complaint not before specifically "admitted, qualified, or denied." It was held that the answer did not raise an issue on the allegations of the complaint that defendants made the excavation which caused the injury and that the same was in a public street, and consequently plaintiff was not required to prove them at the trial. See Equity in Procedure, Wm. T. Hughes, 1911, pages 35-52; esp. p. 35; Nalle v. Oyster, 230 U. S. 5, 57 L. Ed. 1439; Windsor v. McVeigh, 3 Gr. & Rud. 93 U. S. 247.

Taking, for a moment, the theory of the defendant in error, that only the question of the nature of the use is a question for the court, it is apparent from an inspection of the statutes that if the work for which the property is proposed to be taken is not a public utility or a public improvement, is not a public use at all, then the later provisions of Section 1241 have no application. Consequently the land owner had a right to have this question determined by the court itself upon the court's own findings of fact. The court could not determine whether the use was one authorized by law, namely, a public use, until it had been informed of the facts surrounding and affecting the question. It was not enough that the work was called a highway. It was not enough that the work was a road over which the public could have a theoretical right to travel. If in truth and in fact it was a mere guise of the parties for taking the landowner's property against his will, then the first condition of the statute had not been complied with. This is exactly what the landowner pleaded and offered to prove, but was refused the right of having an issue thereon.

The finding of the legislative body had nothing to do with that question, assuming for the moment that it had full power to decide the questions of necessity and location, because the time had not come when the legislative body could act. The legislature could not take from the court the right to determine for itself whether the proposed work was in its nature a public utility, and in order to determine whether it was in its nature a public utility or only a sham and pretense under the name of a public utility, the court had a right to determine the facts as well as the law, in so far as necessary in order to determine whether the first condition had been complied with, namely, whether the use is a public use, or in the words of Section 1241, "A use authorized by law," a use for which one's property may be taken from him against his will.

It is not enough, we repeat, that the thing for which the property is to be taken is *called* a highway. Highways, as such, belong to the class of works of which it may be said that taking land for its use is taking land for a use authorized by law. But if an owner can prove that the thing called a highway is not such in fact but only in name, should he not be allowed to do so? We submit that it is not enough to constitute a road or a highway, that the public have a right to travel over it. It is not possible that the city or the county may turn the private driveway in a private estate into a public highway and justify it on the sole ground that the public may use it if they wish to,—even though its use would be of no convenience to the public unless it were to gratify their curiosity. We submit that it is not a use authorized by law for which the land of the owner may be taken against his will,

that a road be laid out into a private estate, merely to enable curious individuals to drive in and drive out and see what kind of a place the owner has.

We submit that one of the most important questions presented by this record is the one discussed under the final heading of this brief. We feel that in the time at our disposal for oral argument it is almost impossible to present adequately anything more than the most striking features of these appeals. Still the crux and the elements of the entire case can be understood and appreciated by a single reading of the four opinions, which combined do not make more pages than are often used in disposing of a single one of the more important cases which come before this Court. To the property owner as well as to the County of Los Angeles, this case is of the utmost and vital importance. The four opinions to which we refer are as follows:

(1) Opinion of R. S. Bean, District Judge, in U. S. of America v. Rindge, *et al.* (Tr. Vol. 1, Fols. 759-837.)

(2) Opinion of Justice Henshaw, in People of the State of California v. May K. Rindge, *et al.* (Tr., Vol. I, Fols. 837-903.)

(3) Decision of the Superior Court of the State of California in and for the County of Los Angeles, on Questions of Necessity. (Tr., Vol. 3, Fols. 425-472.)

(4) Opinion of the District Court of Appeals, Second Appellate District, State of California, Division One, in the present proceedings. (Tr., Vol. 3, Fols. 4243-4294.) Printed as an appendix to this brief p. 68, for the convenience of the Court, this opinion being challenged by the writ of error herein.

CONCLUSION.

We are unable to conclude this brief without noticing the remark of counsel for Defendant in Error to the effect that this is one of the many cases which should never have come before this Court. We respectfully submit that those portions of the record which we have particularly pointed out, and particularly and especially the opinion of the District Court of Appeals, furnish every reason and every justification for bringing these cases before this Court. Our contention is that one of the greatest functions of the Supreme Court of the United States is the protection of the private citizen from the informal and shifting kind of proceedings which this record discloses, and from the systematic attack upon his rights which is also disclosed by this record. We can easily see that the Defendant in Error would prefer that these cases should not have been brought to the attention of this Court, but we feel that our clients have only exercised their rights in bringing them there, where, at last, they may be assured of a review of all former proceedings and a test thereof, guided and controlled by those ancient principles upon which our form of Government was founded, but which appear at times to have been overlooked or forgotten by the tribunals from whose rulings we have appealed.

To summarize our arguments:

I.

This Court has jurisdiction for the reason that the Federal question involved was presented at the outset, insisted upon throughout all the proceedings and that

it controls and overshadows all other elements in the case.

II.

California Code of Civil Procedure, Section 1241, is repugnant to the due process clause of the Fourteenth Amendment, because it takes property without due process of law, because it denies to the property owner the equal protection of the law, and because it undertakes to make the Court a mere registering agent of the will of the legislature.

III.

Plaintiffs in Error were denied the equal protection of the law for the reason that the classification made by Section 1241 is wholly arbitrary and unreasonable.

IV.

The striking out of the special separate defenses was not cured by the introduction of testimony to prove that the use was not public and the Court, by striking out the special separate defenses, deprived itself of jurisdiction to decide the issue of whether the so-called public utility was in fact a public utility or only a sham and a pretense.

For the above reasons Plantiffs in Error pray that the judgment in each case should be reversed.

Respectfully submitted,

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APPENDIX.

OPINION OF THE DISTRICT COURT OF APPEAL.

The above-entitled actions were instituted by the county of Los Angeles to condemn certain lands described in the complaints therein for use as highways. In each case an interlocutory judgment as prayed for was rendered for the plaintiff, followed by a final order of condemnation, from which judgment and order so rendered in each case the defendants therein have appealed.

In the first above entitled case, and which appellants designate the "Main Road" case, the action was to condemn a strip of land from a public highway at a point on the southeasterly boundry line of the Malibu ranch, and through said ranch for a distance of some twenty miles or more to the easterly boundary line of Ventura county, at which point the proposed road terminated upon private land. In the other action, No. 3533½, it was sought to condemn land for a lateral highway beginning at a point on the proposed "Main Road" and running thence easterly to the east boundary line of the Malibu ranch and terminating likewise upon private lands owned by one Decker, which highway appellants designate as the "Alisos Canyon Road." The questions involved in each case are the same and the grounds upon which appellants base their claim for a reversal are identical.

In both cases the proceedings were instituted by a resolution adopted *ex parte* and without a hearing accorded defendants by the board of supervisors of Los Angeles county. Omitting the description, the resolution initiating the proceeding as to the "Main Road"

case (that adopted in the other being of like form and effect) is as follows:

"Whereas, the public necessity and interest of the people of the county of Los Angeles do require that a certain highway be constructed in said county over and across those certain parcels of real property hereinafter described, and for that purpose and for such public use it is necessary that those certain pieces or parcels of real property hereinafter described be acquired by said county by condemnation namely: the following described property located in the county of Los Angeles, state of California, to-wit:

"(Description of forty-foot right of way strip, and also of some 146 side parcels.) * * * excepting so much of said land as is now included within any public highway, alley or lane.

"Further reference is hereby made to said county surveyor's map No. 8070, on which the location of all parcels of land herein described is accurately shown.

"Now, therefore, be it resolved, and it is the finding and determination of this board, that the public interest and necessity require the acquisition by the county of Los Angeles of those certain pieces or parcels of land hereinbefore described for a public purpose, namely: for public highway purposes, and for the construction and completion of a public highway thereover; and

"Be it further resolved, that those certain pieces or parcels of land herinabove described be condemned for a public purpose, namely for a public highway and the construction and completion thereof, and the county counsel of the county of Los Angeles is hereby directed to institute proceedings in the Superior Court of the

state of California in and for the county of Los Angeles for the condemnation of those certain pieces or parcels of real property hereinabove described for public highway purposes and to take all steps necessary for the condemnation of said pieces or parcels of land in the name of said county;"

in accordance with which the county counsel instituted the actions for the condemnation of the parcels of real estate described therein.

Demurrers interposed by the defendants to the complaints were overruled. Appellants insist that such rulings constituted fatal error for the reason that the powers conferred by law upon the board of supervisors to establish public highways are those *only* embodied in sections of the Political Code numbered 2681 to 2698, inclusive, which procedure therein prescribed is designated the "viewer" method and not infrequently adopted by counties in acquiring lands for highways; hence the resolutions of the board of supervisors authorizing the condemnation suits were not sufficient to confer jurisdiction upon the trial court, from which fact it follows that all proceedings had pursuant to such resolutions were void, including the commencement of the actions and the judgments and orders appealed from. It is unnecessary to enter upon an extended discussion of appellants' voluminous brief and argument in support of this point. Suffice it to say the identical question, involved in the case of *Adamson v. County of Los Angeles*, reported in volume 34, California Appellate Decisions, page 888, was decided adversely to appellants by the District Court of Appeal for the First District, and a transfer of the case denied by the Supreme Court. In that action Adamson, as a

taxpayer, set forth in his complaint the proceedings had and taken by the Board of Supervisors in the acquisition of the property in question, and, insisting the entire proceedings for condemning the same were unauthorized and void, sought to have the county enjoined from proceeding with construction work in the "Main Road" case. In deciding the case the court said: "The provisions of article VI of chapter 2 of title VI of the Political Code, comprising sections 2681 to 2698 thereof, do not purport to be exclusive, and may not be held to be so in view of the express grant of power embodied in sub-division 4 of section 2643 above quoted, and of the even more comprehensive enumeration of the general permanent powers of boards of supervisors contained in section 4041 of the Political Code by which such boards are expressly authorized 'to acquire and take by purchase, *condemnation* or otherwise land for the uses and purposes of public roads, highways and so forth'." The contention of appellant in the Adamson case was identical with that here urged; the argument of appellant there was identical with the argument made in the instant cases; and the adverse decision of the court in that case must be deemed determinative of the same question presented in these appeals.

Another alleged erroneous ruling upon which appellants claim a reversal is that the court, upon defendants' motion for a new trial, denied it upon terms, the effect of which was an exercise by the court of the functions of the jury, by reason of which defendants were deprived of the constitutional right of having a vital element of damage determined by the jury. It appears that, among other things, the jury found it would require 29 miles of fencing to fence the Rindge Company's land along the roadway and that the cost

per mile would be $650, aggregating the sum of $18,850. On motion for new trial one of the specifications of error was that the jury improperly determined the number of miles of fencing which would be required, and it being made to appear to the court that, instead of 29 miles as found by the jury, it would require 31½ miles, the cost of which would be $1,625 more than that found by the jury, the court, as a condition of its order denying the motion for a new trial, made an order requiring that plaintiff consent to the increase in the judgment; whereupon counsel for plaintiff filed a written stipulation consenting to such increase in the amount of defendants' compensation, and thereupon the court made its order denying the motion for new trial. Upon the same contention, based upon the same facts and supported by the same argument made by the same attorneys, the court in the Adamson case, *supra,* held that in an action by a county for the condemnation of land for a public highway the county counsel, as attorney representing the county, has authority on a motion for a new trial to consent to an order increasing the amount of compensation awarded to the defendant by the verdict of the jury due to an error in computing the amount of required fencing of defendant's land along the roadway.

In support of its case plaintiff introduced in evidence the resolution, copy of which is hereinbefore set out, together with a minute entry of the board showing that it was adopted by a vote of more than two-thirds of the members thereof. Thereupon plaintiff rested and defendants moved for a nonsuit. The motion was denied, and the ruling is assigned as error.

Section 1241, Code of Civil Procedure, provides that

before property can be taken by condemnation it must appear: "1. That the use to which it is to be applied is a use authorized by law; 2. That the taking is necessary to such use; provided, when the legislative body of a county * * * shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity required the acquisition, * * * by such county * * * of any * * * public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed * * * public improvement; (b) that such property is necessary therefor, and (c) that such proposed * * * public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury."

Since the resolution declaring the land necessary for the proposed highway was adopted by a two-thirds vote of the members of the board of supervisors, it must, as provided by the statute, be accepted as conclusive evidence of the necessity for taking the property, unless, as claimed by appellants, that as so construed it is unconstitutional. This contention is based upon the claim that the determination of the facts so found by the resolution were in their nature judicial, and since the action of the board in adopting the resolution was had *ex parte* and without notice or hearing given to appellants, the effect of the judgment based thereon was to deprive them of their property without due process of law. That the purpose for which the property was sought to be condemned is a public use, admits of no question. (Sec. 1238, Code Civ. Proc.)

When the use is public, the necessity of appropriating any particular property therefor is not a subject of judicial cognizance, but one which appertains to the legislative branch of the government, and the right to so appropriate may be exercised by the state or such subordinate bodies to which by legislative grant the power is entrusted. See Lewis on Eminent Domain (3rd ed.), Secs. 369, 595 and 596; Cooley on Constitutional Limitations, p. 777; *Secombe v. R. R. Co.*, 90 U. S. 108; *Miss. etc. Boom Co. v. Patterson*, 98 U. S. 403; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Lamb v. Schottler*, 54 Cal. 319; *Wulzen v. Board of Supervisors*, 101 Cal. 15, and *People v. Smith*, 21 N. Y. 595; all of which are authorities in support of the proposition that, in the absence of constitutional provisions so requiring it—and there are none in this state—the Legislature may delegate to the boards of supervisors of the counties of the state the power to determine *ex parte* by resolution, as in the instant cases, the necessity for taking property for public use and make such resolution conclusive evidence of the facts enumerated in section 1241, Code of Civil Procedure. In Cooley's Constitutional Limitations, page 760, it is said that "a legislative act declaring the necessity, being the customary mode in which that fact is determined, must be held to be for this purpose 'the law of the land,' and no further finding or adjudication can be essential, unless the Constitution of the state has expressly required it." And at page 777 of the same work it is said that, while the question of necessity may be referred to a local tribunal or submitted to a jury to decide upon evidence, "the parties interested have no constitutional right to be heard upon the question, unless the state Constitution clearly and expressly

recognizes and provides for it." *People v. Smith, supra,* is authority for the statement that the Legislature "may allow the owner to intervene and participate in the discussion before the officer or board to whom the power of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty, without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the Legislature shall, in its discretion prescribe." In the case of *Board of Water Commissioners v. Johnson,* 84 Atl. 727, the court said: "But the respondents urge that they have never had the opportunity to be heard upon the question of necessity, and that for that reason there has not been due process of law. They were not entitled to such opportunity. It is well settled that, as related to the exercise of the power of eminent domain, all questions which are political in their nature and lie within the legislative province may be determined without notice to the owner of the property affected, and * * * the owner is not entitled to a hearing upon it as a matter of right." In *Wulzen v. Board of Supervisors, supra,* it is said: "The determination as to whether or not the right of eminent domain should be exercised and as to what lands are necessary to be taken in the exercise of that right, is a political and legislative question and not a judicial one. Its determination rests exclusively with the Legislature, or with such subordinate legislative bodies as it may be properly devolved upon, and the question of whether the exercise of the power is wise or not is one with which the judicial department has no concern." Property is held in private owner-

ship subject to the right of the state in its sovereign capacity to take it for public use; the only restriction upon such right being that it "shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." (Sec. 14, art. I, Const.) Hence, where the owner of the land sought to be condemned by the state for a use declared by law to be a public use is accorded his constitutional right to compensation for the taking he cannot question the procedure or instrumentalities which the Legislature has provided as a means for acquiring the property. Its motives or reasons for declaring that it is necessary to take the land are no concern of his. In our opinion, the provision of section 1241, Code of Civil Procedure, making the determination of the board of supervisors of the county conclusive evidence of the necessity for taking the land for a public highway, is not obnoxious to any provision of the State or Federal Constitution.

However, this may be, and contrary to the views herein expressed, the trial court agreed with defendants' contention that the resolution was not conclusive evidence of the facts so found, but did admit it as a sufficient *prima facie* showing of such facts, and upon this theory denied the motion for nonsuit. Thereupon, and after denial of their motion, defendants were given the widest latitude in offering a mass of evidence for the purpose of showing there was no necessity for the proposed highway, followed by plaintiff, which, in rebuttal, introduced a vast deal of evidence likewise touching the question of necessity for the improvement. Indeed, it appears from the voluminous record that no restrictions whatsoever were imposed upon

either party in the introduction of evidence touching the question. Under these circumstances and assuming the court erred in accepting the resolution even as *prima facie* evidence, nevertheless we cannot perceive how defendants were prejudiced by the circumstance, since the testimony which, according to appellants' theory, should have been produced during plaintiff's presentation of its case in chief was later in the trial supplied. The error is predicated solely upon the order in which the evidence touching the question was admitted. "It is well settled that an order denying a motion for a non-suit will not be disturbed, although the evidence at the close of plaintiff's case was so weak that it might properly have been granted, if upon the trial the defect is overcome by evidence subsequently introduced." (*Peters v. Southern Pacific Co.*, 160 Cal. 48; *Lowe v. San Francisco etc. Ry. Co.*, 154 Cal. 573.) Since both parties were permitted, after the ruling upon the motion, to introduce evidence, without restriction, touching the question of necessity, defendants could in no event have been prejudiced by the ruling.

As a separate defense the defendants May K. Rindge and Rindge Company alleged that all of the property which plaintiff sought to condemn was within the boundaries of the Malibu ranch in Los Angeles county; that while the ranch was owned in severalty by May K. Rindge and the Rindge Company, it was, and had been for more than twenty years, with knowledge of plaintiff, operated as a single ranch under one management and control; that the westerly end of said proposed highway terminates at and upon the boundary line between Los Angeles county and Ventura county upon

the Malibu ranch which, as owned by defendants, extends into Ventura county for a distance of —— miles, all of which is managed, operated and controlled by said defendants with the lands of said ranch so located in Los Angeles county; that there is no public road of any kind or character whatever within —— miles of the Ventura county end of said ranch, and the only means of egress and ingress to the westerly terminus of said proposed road is by private trails and ways; that said proposed road or highway, if condemned, would be located wholly and solely upon that part of the Malibu ranch situated in Los Angeles county and would end and terminate upon private property of the Rindge Company at the Ventura county line, and as constructed would give access wholly and solely to the private ranch property of defendants May K. Rindge and Rindge Company, and could not furnish any way of necessity or convenience to the general public; that the owners of said ranch have no need or desire for a public road thereon, which, if constructed, would be a constant menace and damage to their ranch property; by reason of which facts it is alleged the taking of said property for the purpose contemplated would be without necessity of any kind or right. Upon the grounds and for the reason that all of the matter so alleged as a separate defense was irrelevant, immaterial, surplusage and conclusions of law, plaintiff moved to strike the same from the answer. This motion was granted, and appellants assign the ruling as error. Counsel for appellants insist the special defense so pleaded was upon the theory that an isolated road within the boundaries of what is practically one property and not desired by the owners thereof and which

could afford no real service to any part of the public as a road, could not possibly be a public necessity for which condemnation would lie. While this contention is fully answered by the fact that the resolution was conclusive evidence of the taking being necessary, nevertheless, conceding such theory warranted by the alleged facts, it appears that every material issue tendered by the so-called separate defense was not only raised by the complaint and the answers thereto, but that in the trial thereof defendant, without objection or restriction, was accorded every opportunity, of which it availed itself, in offering evidence touching every matter contained in the pleading so stricken out by order of the court. There was no error in the ruling, but conceding as much, it is impossibe to perceive how defendants, under the circumstances, could have suffered any prejudice by reason thereof.

It appears that while the eastern terminus of the main road connected with a public highway, the western terminus thereof was at the boundary line separating Los Angeles county from Ventura county, at which point it connected with no road extending into or connecting with roads in said last-named county, and that the Alisos Canyon road, likewise extending from the proposed main road to the boundary line common to the Malibu ranch and the lands of one Decker, was not connected with a highway; and basing their contention upon these facts, appellants insist that the board of supervisors had no power to lay out highways terminating at county lines or points on private lands which did not connect with or intersect other highways affording means of continuous travel. There is no merit in contention. No such restrictions upon the power of

counties to establish highways are imposed by statute, and to hold that a county could not condemn lands for a highway to the line of another county unless there existed an established highway in such latter county with which to connect its proposed road would obvivously lead to embarrassment and difficulty in establishing highways from one county to another. (*Rice v. Rindge,* 53 N. H. 530.)

The use for which the property was sought to be condemned is declared by section 1239, Code of Civil Procedure, to be a public use. The resolution adopted by a vote of two-thirds of the members of the board of supervisors not only vested the court with jurisdiction of the proceedings for condemnation, but when received in evidence the finding and determination of the board as therein expressed, to the effect that the taking of the parcel of land described in the complaint was necessary for such public use and the proposed improvement located in the manner most compatible with the greatest public good and least private injury, was conclusive evidence of such facts; hence, while not prejudicial, any evidence touching such issue of necessity or hearings had before the board of supervisors other than the resolution, was immaterial. In no event, and from whatever angle the facts are viewed, are we able to perceive how defendants' substantial rights were prejudiced by any ruling of the court during the trial.

The judgments and orders are affirmed.

SHAW, *J.*

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

Rindge Company, a Corporation, May K. Rindge, Hueneme, Malibu & Southern Railway, a Corporation, and Hueneme, Malibu & Port Los Angeles Railway, a Corporation,
Plaintiffs in Error,

vs.

County of Los Angeles,
Defendant in Error.

Rindge Company, a Corporation,
Plaintiff in Error,

vs.

County of Los Angeles,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Plaintiffs in error, Rindge Company and May K. Rindge, are the owners of an oblong tract of land, known as the Rancho Topango Malibu

Sequit, lying along the Pacific Ocean in the county of Los Angeles, California, about twenty-two miles in length along the ocean shore and varying from one-half to one and one-half miles in width.

On the 26th day of August, 1916, the Board of Supervisors of defendant in error, County of Los Angeles (the governing body of the county), without notice to or hearing given plaintiffs in error, by unanimous vote duly and regularly adopted a resolution determining that the public interest and necessity required the acquisition by the county of Los Angeles of a strip of land forty feet in width, running longitudinally through the above tract of land, for public highway purposes and for the construction and completion of a public highway thereover, determining that the strip of land therein described be condemned for such purposes and directing the county counsel of the county of Los Angeles to institute procedings accordingly. [Tr. Vol. I, fols. 667-676.]

On the 3d day of December, 1917, the same Board of Supervisors, without notice to or hearing given plaintiffs in error, by four-fifths vote duly and regularly adopted a similar resolution as to a strip of land forty feet in width, running latitudinally through the same land, approximately at right angles from and to the

strip described in the first resolution. [Tr. Vol. I, fols. 676-679.]

Actions in eminent domain were duly instituted for the condemnation of the strips of land described in the resolutions. These actions were tried at the same time, though not consolidated. [Tr. Vol. I, fol. 642.] The compensation to be paid to the owner was determined by a jury and paid into court for the owners. [Tr. Vol. I, fols. 485-487, 621-622.] Verdicts were rendered and judgments entered condemning the land described in the resolutions. [Tr. Vol. I, fols. 370, 585, 412, 485, 606, 621.] The owners of the land condemned duly appealed from the judgments. The judgments were affirmed by the District Court of Appeal of the state of California. (County of Los Angeles v. Rindge Company ... Cal. App. ..., 200 Pac. 27.) [Tr. Vol. III, fols. 4243-4295.] A hearing of the causes by the Supreme Court of California was denied by that court. [Tr. Vol. III, fols. 4295-4297.] The causes were heard on one record by the District Court of Appeal and are before this court by writ of error on one record, by stipulation. The same questions are involved in the two cases.

At the trial of the actions defendant in error first offered in evidence the two resolutions above referred to. [Tr. Vol. I, fols. 667-679.]

Thereupon it rested and plaintiffs in error moved for a nonsuit. The motion was denied.

The basis of the motion for a nonsuit was that defendant in error had failed to prove (a) that the taking is necessary to the use in question, namely, highway purposes (b) the public necessity of such proposed public utility or public improvement, (c) that such property which it is proposed shall be taken is necessary therefor, and (d) that such public utility or public improvement is planned or located in the manner which would be most compatible with the greatest public good and the least private injury. [Tr. Vol. I, fols. 681-683.]

The trial court held that the resolutions were *prima facie* evidence and the District Court of Appeal that they were conclusive evidence of such facts. The holding of the District Court of Appeal was predicated on the provisions of section 1241 of the Code of Civil Procedure of California.

That section in its pertinent parts, prior to the year 1913 read:

> "Before property can be taken, it must appear:
>
> "1. That the use to which it is to be applied is a use authorized by law;
>
> "2. That the taking is necessary to such use."

In 1913 the Legislature of California amended subdivision 2 of section 1241 to read as follows:

> "That the taking is necessary to such use; *provided,* when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; *provided,* that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, of property located outside of the territorial limits thereof." (Calif. Stats. 1913, p. 549.)

It is the contention of plaintiffs in error in this court that the Amendment of 1913 is unconstitutional and void for the reason that it is repugnant to the Fourteenth Amendment to the Federal Constitution.

They say:

"The record herein referred to involves the following questions:

1. Was the property sought to be condemned for a use authorized by law, and was the taking necessary to such use?

2. Was there any public necessity for the proposed highways, in view of the fact that they were located exclusively on private property?

3. Were the resolutions adopted by the Board of Supervisors of Los Angeles county conclusive evidence of the facts required to be found by section 1241 of the California Code of Civil Procedure before a citizen's property may be condemned, and is the proviso of that section constitutional?

4. Was the trial court justified in holding that the resolutions adopted by the Board of Supervisors of Los Angeles county were only *prima facie* evidence of the facts required to be found by section 1241 of California Code of Civil Procedure, and that the burden was cast upon plaintiffs in error to negative this *prima facie* showing by clear and convincing evidence?

5. Were plaintiffs in error deprived of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, or have they or either of them been denied the equal protection of the laws, in violation of the said amendment?"

After setting forth that the record involves the above enumerated questions, plaintiffs in error, in their argument, discuss the following:

"(1) The special defenses stricken out raised the question whether the land sought to be condemned was being taken for a public use authorized by law.

(2) The Amendment of 1913 to section 1241 of the California Code of Civil Procedure, declaring certain resolutions to be conclusive evidence of the facts stated, was and is unconstitutional and void.

(3) The holding of the trial court that the resolutions were only *prima facie* evidence of the facts recited instead of conclusive, did not cure the error, or make the amendment in question valid as to plaintiffs in error.

(4) Plaintiffs in error have been deprived of their property without due process of law and have been denied the equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution."

We proceed with the argument.

POINTS AND AUTHORITIES.

FIRST.

This Court Is Without Jurisdiction.

The decision of the state court was put on the ground that plaintiffs in error were accorded every right claimed by them under the Federal Constitution and for that reason were not in a position to complain of the alleged unconstitutionality of section 1241 of the California Code of Civil Procedure. It is true

that the court held section 1241 valid and constitutional but it also held that if it were conceded that section 1241 was unconstitutional, plaintiffs in error were not prejudiced because of the fact that they were accorded every right claimed by them under the Federal Constitution. [Tr. Vol. III, fols. 4243-4294.]

Plaintiffs in error claim that the Amendment of 1913 to section 1241 is unconstitutional and void. The same claim was made in the trial court and that court agreed with them and proceeded as though the amendment had never been enacted. They contend that the striking out of their special separate defenses prevented them from showing that the purpose for which their property was to be taken was not a public one. Under the allegations of the complaint, the answers and special separate defenses remaining after the striking out of the one referred to, they were afforded and took advantage of the opportunity of showing that the use was not public.

The learned District Court of Appeal said:

> "As a separate defense the defendants May K. Rindge and Rindge Company alleged that all of the property which plaintiff sought to condemn was within the boundaries of the Malibu ranch in Los Angeles county; that while the ranch was owned in severalty by May K. Rindge and the Rindge Company, it was, and had been

for more than 20 years, with the knowledge of plaintiff, operated as a single ranch under one management and control; that the westerly end of said proposed highway terminates at and upon the boundary line between Los Angeles county and Ventura county upon the Malibu ranch, which, as owned by defendants, extends into Ventura county for a distance of —— miles, all of which is managed, operated and controlled by said defendants with the lands of said ranch so located in Los Angeles county; that there is no public road of any kind or character whatever within ——miles of the Ventura county end of said ranch, and the only means of egress and ingress to the westerly terminus of said proposed road is by private trails and ways; that said proposed road or highway, if condemned, would be located wholly and solely upon that part of the Malibu ranch situated in Los Angeles county, and would end and terminate upon private property of the Rindge Company at the Ventura county line, and as constructed would give access wholly and solely to the private ranch property of defendants May K. Rindge and Rindge Company, and could not furnish any way of necessity or convenience to the general public; that the owners of said ranch have no need or desire for a public road thereon, which, if constructed, would be a constant menace and damage to their ranch property; by reason of which facts it is alleged the taking of said property for the purpose contemplated would be without necessity of any kind or right. Upon the grounds and for the reason that all of the matter so alleged as a separate defense was irrele-

vant, immaterial, surplusage, and conclusions of law, plaintiff moved to strike the same from the answer. This motion was granted, and appellants assign the ruling as error. Counsel for appellants insist the special defense so pleaded was upon the theory that an isolated road within the boundaries of what is practically one property and not desired by the owners thereof, and which could afford no real service to any part of the public as a road, could not possibly be a public necessity for which condemnation would lie. While this contention is fully answered by the fact that the resolution was conclusive evidence of the taking being necessary, nevertheless, conceding such theory warranted by the alleged facts, it appears that every material issue tendered by the so-called separate defense was not only raised by the complaint and the answers thereto, but that in the trial thereof defendant, without objection or restriction, was accorded every opportunity, of which it availed itself, in offering evidence touching every matter contained in the pleading so stricken out by order of the court. There was no error in the ruling, but, conceding as much, it is impossible to perceive how defendants, under the circumstances, could have suffered any prejudice by reason thereof." (200 Pac. 27, at p. 31.)

After the introduction in evidence of the resolutions of the Board of Supervisors which the trial court held were *prima facie* evidence of the facts enumerated in the *proviso,* plaintiffs in error introduced testimony for the pur-

pose of overcoming the *prima facie* effect of the resolutions. Defendant in error then introduced testimony tending to show the necessity for the highway, the necessity for the particular land sought to be taken and that it was located in the manner most compatible with the greatest public good and the least private injury.

The District Court of Appeal said:

> "However this may be, and contrary to the views herein expressed, the trial court agreed with defendants' contention that the resolution was not conclusive evidence of the facts so found, but did admit it as a sufficient *prima facie* showing of such facts, and upon this theory denied the motion for nonsuit. Thereupon, and after the denial of their motion, defendants were given the widest latitude in offering a mass of evidence for the purpose of showing there was no necessity for the proposed highway, followed by plaintiff, which in rebuttal, introduced a vast deal of evidence, likewise touching the question of necessity for the improvement. Indeed, it appears from the voluminous record that no restrictions whatsoever were imposed upon either party in the introduction of evidence touching the question. Under these circumstances, and assuming the court erred in accepting the resolution even as *prima facie* evidence, nevertheless we cannot perceive how defendants were prejudiced by the circumstances, since the testimony which, according to appellants' theory, should have been produced during

plaintiff's presentation of its case in chief was later in the trial supplied. The error is predicated solely upon the order in which the evidence touching the question was admitted.

"'It is well settled that an order denying a motion for a nonsuit will not be disturbed, although the evidence at the close of plaintiff's case was so weak that it might properly have been granted, if upon the trial the defect is overcome by evidence subsequently introduced.' Peters v. Southern Pacific Co., 160 Cal. 48, 116 Pac. 400; Lowe v. San Francisco, etc., Ry. Co., 154 Cal. 573, 98 Pac. 678.

"'Since both parties were permitted, after the ruling upon the motion, to introduce evidence, without restriction, touching the question of necessity, defendants could in no event have been prejudiced by the ruling.'" (P. 31.)

The rule applicable here is found in *Baltimore Traction Co. v. B. Belt R. Co.* (1893), 151 U. S. 137, 14 S. Ct. 294, 38 L. Ed. 102, in which it is held that where a statute providing for condemnation proceedings has been construed by the state courts as requiring notice no federal question with respect to due process of law can be based upon the objection that such statute allows condemnation without notice.

The statute in question was construed by the trial court as unconstitutional and void and it was held that the issues of necessity for the highway, necessity for the particular land con-

demned for the highway and the proper location thereof were before the trial court for hearing and determination after notice to plaintiffs in error. There can, therefore, be no question with respect to due process of law based upon the objection that the statute allows the determination of these matters without notice.

The decision of the federal questions was rendered unnecessary by the view taken of the case by the District Court of Appeal as quoted above. If the decision of a federal question by a state court is rendered unnecessary by the view the court properly takes of the case within the scope of the pleadings, the judgment is not open for review in the United States Supreme Court. (*Chapman v. Goodnow* (1887), 123 U. S. 540, 8 S. Ct. 211, 31 L. Ed. 235; *Wells v. Crane* (1893), 150 U. S. 84, 14 S. Ct. 22, 37 L. Ed. 1007.)

Under these circumstances this court will affirm the judgment. (*Murdock v. City of Memphis* (1874), 87 U. S. 590, 20 Wall 591, 22 L. Ed. 429.)

Where a state decision of an alleged federal question was not necessary to its judgment, but the court also puts its decision upon another ground not repugnant to the Federal Constitution, the United States Supreme Court has no jurisdiction. (*Brooks v. Missouri* (1887), 124 U. S. 394, 31 L. Ed. 454.)

This court will not entertain jurisdiction of state judgments where, beside the federal question decided by the state court, there is another and distinct ground on which the judgment can be sustained. (*Kennebeck & P. R. Co. v. Portland & K. R. Co.* (1871), 81 U. S. 14 Wall. 23, 20 L. Ed. 850; *Rector v. Ashley* (1867), 73 U. S. 6 Wall. 142, 18 L. Ed. 733; *Gibson v. Choteau* (1868), 75 U. S. 8 Wall. 314, 19 L. Ed. 317; *Klinger v. Missouri* (1871), 80 U. S. 13 Wall. 257, 20 L. Ed. 635; *Detroit City R. Co. v. Guthard* (1884), 114 U. S. 133, 29 L. Ed. 118; *New York etc. Co. v. New York* (1901), 186 U. S. 269, 22 S. Ct. 916, 46 L. Ed. 1158; *Hale v. Lewis* (1900), 181 U. S. 473, 21 S. Ct. 677, 45 L. Ed. 959; *Mobile etc. Co. v. Miss* (1907), 210 U. S. 187, 28 S. Ct. 650, 52 L. Ed. 1016; *Gaar etc. Co. v. Shannon* (1911), 223 U. S. 468, 32 S. Ct. 236, 56 L. Ed. 510.)

And this is true even though the Supreme Court of the United States may think the position of the state court is an unsound one. (*Klinger v. Missouri* (1871), 80 U. S. 13 Wall. 257, 20 L. Ed. 635; *DeSaussure v. Gaillard* (1887), 127 U. S. 216, 8 S. Ct. 1053, 32 L. Ed. 125.)

It must appear that the case could not have been decided without deciding the federal question. (*Brown v. Atwell* (1875), 92 U. S. 327,

23 L. Ed. 511; *DeSaussure v. Gaillerd* (1887), 127 U. S. 216, 8 S. Ct. 1053, 32 L. Ed. 125.)

For this reason it is respectfully submitted that this court is without jurisdiction and that the judgment should be affirmed on this ground. However, out of an overabundance of precaution we will discuss the alleged federal constitutional questions raised by plaintiffs in error.

SECOND.

California Code of Civil Procedure, Section 1241, as Amended in 1913, Is Not Repugnant to the Due Process of Law Clause of the Federal Constitution.

The right of eminent domain is an attribute of sovereignty. It is inherent in the state and exists independent of the Constitution. All private property is held subject to this right in the state. The nature of the right contemplates that private property is to be taken for public use. Conversely, private property may not be taken by the state unless the purpose for which it is taken is a public one. Other than this limitation inwrought in the right itself, the only restriction on the power of the state is that to be found in the Constitution of the United States and of California,—that compensation shall be paid or tendered to the own-

er. (Constitution United States, Fourteenth Amendment; California Constitution, Art. I, Sec. 14.) In all other respects the state, acting through the Legislature, is unfettered in exercising this sovereign power.

When the state or one of its agencies exercises this sovereign right two separate functions of government are set in action. First, the legislative function determining the necessity for the exercise of the power, the necessity for taking the particular property, the quantity to be taken and the location of the public improvement. Second, the judicial function, determining whether the purpose for which the property is to be taken is public, and the compensation to be paid the property owner.

The legislative function is not subject to any limitation or restriction of the Federal Constitution. The Legislature may, by direct statutory enactment, take any particular property or it may delegate that power to a subordinate tribunal to be exercised in any manner prescribed by the Legislature.

The judicial function is subject to the due process of law clause of the Fourteenth Amendment. Property may not be taken for a private use and it may not be taken without compensating the owner.

Here we are concerned with the legislative function only. The *proviso* inserted in section

1241 of the California Code of Civil Procedure by the Amendment of 1913 concerns only (a) the necessity for the proposed improvement (b) the necessity of the particular property therefor, and (c) the location of the proposed improvement. It is the determination of these questions only which is made conclusive on the property owner without notice or hearing. He is not entitled to notice or hearing on the determination of these questions.

The judicial function remains to be exercised upon notice and hearing in the judicial proceeding. By subdivision 1 of section 1241, to which the *proviso* does not relate, the court must determine whether the taking is for a public use. Compensation is determined as provided elsewhere. Constitutionally this is all the property owner is entitled to—a judicial determination of whether the use is public, and compensation.

The Fourteenth Amendment to the Federal Constitution does not require that a property owner shall be given notice of or accorded a hearing on the consideration or determination of the questions of (a) the public necessity of the proposed public improvement (b) the necessity of the particular property for such public improvement, and (c) the location of such public improvement.

We approach a consideration of the authorities among which there is no conflict supporting the argument and statements set forth above. These authorities hold that a Legislature may determine the matters enumerated in the *proviso* to section 1241 by direct legislative enactment or through a subordinate tribunal in any manner it may prescribe, without notice or hearing given the property owner, without violating the Fourteenth Amendment.

In the late case of *Bragg v. Weaver* (1919), 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135, the facts are stated in the opinion as follows:

> "By this suit the owner of land adjoining a public road in Virginia seeks an injunction against the taking of earth from his land to be used in repairing the road. The taking is from the most convenient and nearest place, where it will be attended by the least expense, and has the express sanction of a statute of the state. Pollard's Code 1904, Sec. 944a, clauses 21 and 22. Whether the statute denies to the owner the due process of law guaranteed by the 14th Amendment is the federal question in the case. It was duly presented in the state court. and, while no opinion was delivered, the record makes it plain that, by the judgment rendered, the court resolved the question in favor of the validity of the statute.
>
> "It is conceded that the taking is under the direction of public officers and is for a public use; also that adequate provision is made for the payment of such compensation as may be awarded. Hence no dis-

cussion of these matters is required. The objection urged against the statute is that it makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid." (P. 58.)

The court said:

"Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment. Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 406, 25 L. Ed. 206, 207; A. Backus, Jr., & Sons v. Fort Street Union Depot Co., 169 U. S. 557-568, 42 L. Ed. 853, 858, 18 Sup. Ct. Rep. 445; Adirondack R. Co. v. New York, 176 U. S. 335, 349, 44 L. Ed. 492, 499, 20 Sup. Ct. Rep. 460; Sears v. Akron, 246 U. S. 242, 251, 62 L. Ed. 688, 698, 38 Sup. Ct. Rep. 245." (P. 58.)

The court states the facts in *Sears v. Akron* (1917), 246 U. S. 242, 38 S. Ct. 245, 62 L. Ed. 688, as follows:

"Akron, Ohio, lies on Little Cuyahoga River a short distance above its confluence with the Big Cuyahoga. In May, 1911, the legislature of Ohio granted to the city, by special act, 'the right to divert and use forever' for the purposes of its water supply 'the Tuscarawas River, the Big Cuya-

hoga and Little Cuyahoga Rivers and the tributaries thereto, now wholly or partly owned or controlled by the state.' The city already possessed, under the General Laws of Ohio, power to appropriate for this purpose, by condemnation proceedings, the property of any private corporation. Acting specifically in exercise of the power conferred by the special act and of every other power thereunto enabling, the city, by resolution of its council, passed May 27, 1912, declared its intention to appropriate all the waters, above a point fixed, of the Cuyahoga River and tributaries; and by an ordinance passed August 26, 1912, it appropriated the same, directed its solicitor to apply to the courts to assess the compensation to be paid, and provided for the payment of 'the costs and expenses of said appropriation' out of an issue of bonds theretofore authorized. The city then constructed a dam and reservoir at the place specified and announced its intention of diverting the water before or by August 1, 1915." (Pp. 243-5.)

This suit was in the federal District Court for an injunction restraining the construction of the dam and the diversion of the water.

The court held:

"Fourth: Plaintiff contends that the ordinance is void because the general statute which authorized the appropriation violates both article 1, section 10, of the Federal Constitution, and the 14th Amendment, in that it authorizes the municipality to determine the necessity for the taking of private property without the owners hav-

ing an opportunity to be heard as to such necessity; that in fact no necessity existed for any taking which would interfere with the company's project; since the city might have taken water from the Little Cuyahoga or the Tuscarawas Rivers; and furthermore, that it has taken ten times as much water as it can legitimately use. It is well settled that while the question whether the purpose of a taking is a public one is judicial (Hairston v. Danville & W. R. Co., 208 U. S. 598, 52 L. Ed. 637, 28 Sup. Ct. Rep, 331, 13 Ann. Cas. 1008), the necessity and the proper extent of a taking is a legislative question (Shoemaker v. United States, 147 U. S. 282, 298, 37 L. Ed. 170, 184, 13 Sup. Ct. Rep. 361; United States v. Gettysburg Electric R. Co., 160 U. S. 668, 685, 40 L. Ed. 576, 582, 16 Sup. Ct. Rep. 427; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 65, 57 L. Ed. 1003, 1076, 33 Sup. Ct. Rep. 667). The legislature may refer such issues, if controverted, to the court for decision (Pittsburg, C. C. & St. L. R. Co. v. Greenville, 69 Ohio St. 487, 69 N. E. 976)." (P. 251.)

In *Secombe v. R. R. Co.* (1874), 90 U. S. 108, 23 Wall. 108, 23 L. Ed. 67, this court declared:

"It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the Legislature. There is no limitation upon the power of the Legislature in this respect, if the purpose be a public

one, and just compensation be paid or tendered to the owner for the property taken." (Pp. 117-118.)

Thus there is no limitation in the Constitution of the United States upon the power of the Legislature of California to enact the *proviso* found in section 1241 of the Code of Civil Procedure, as the only restraint upon the power of the Legislature was that requiring that the purpose be a public one and that compensation be made.

The above case is followed by the leading case of *Boom v. Patterson* (1878), 98 U. S. 403, 25 L. Ed. 206, where the question is more fully discussed. This court, in part, said:

> "The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several states providing for just compensation for property taken is a mere limitation upon the exercise of the right. *When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested.* * * *

> The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court. *Turner v. Halloran,* 11 Minn. 253. The case would have been in no essential particular different had the state authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value." (Italics ours.) (Pp. 406, 407.)

If the purpose be public, the taking may be outright, provided reasonable, certain and adequate provision is made at the time of appropriation to ascertain and secure the compensation to be made to the owner. (*Madisonville Traction Co. v. St. Bernard Min. Co.* (1904), 196 U. S. 239, 49 L. Ed. 462.) The quantity which should be taken is a legislative question. (*U. S. v. Gettysburg Electric R. Co.* (1895), 160 U. S. 668, 680, 40 L. Ed. 576.)

Lewis, in his work on Eminent Domain, 3d edition, Vol. 1, section 255, says:

> "The necessity, expediency or propriety of exercising the power of eminent domain, and the extent and manner of its exercise, are questions of general public policy and belong to the legislative department of the government."

The same learned author, 3d edition, Vol. II, section 453, says:

> "How much may be taken. It has been held to be within the province of the Legislature, in the absence of constitutional provisions on the subject, to determine the quantity, as well as the estate, which may be taken for public use."

Cooley, in his work on Constitutional Limitations, 7th edition, page 760, says:

> "Private property can only be taken pursuant to law; but a legislative act declaring the necessity, being the customary mode in which that fact is determined, must be held to be for this purpose 'the law of the land,' and no further finding of adjudication can be essential, unless the Constitution of the state has expressly required it."

Again, at page 777, this learned author says:

> "The authority to determine in any case whether it is needful to permit the exercise of this power must rest with the state itself; and the question is always one of strictly political character, not requiring any hearing upon the facts or any judicial determination. Nevertheless, when a work or improvement of local importance only is contemplated, the need of which must be determined upon a view of the facts which the people of the vicinity may be supposed best to understand, the question of necessity is generally referred to some local tribunal, and it may even be submitted to a jury to decide upon evidence. But parties interested have no constitutional

right to be heard upon the question, unless the State Constitution clearly and expressly recognizes and provides for it."

See also:

Hays v. Seattle (1919), 251 U. S. 233, 40 S. Ct. 125, 64 L. Ed. 243;

O'Neil v. Leamer (1915), 239 U. S. 244, 36 S. Ct. 54, 60 L. Ed. 249;

U. S. v. Chandler-Dunbar Water Power Co. (1912), 229 U. S. 53, 65, 33 S. Ct. 667, 57 L. Ed. 1063;

Appleby v. Buffalo (1910), 221 U. S. 524, 31 S. Ct. 699, 55 L. Ed. 838;

Adirondack R. Co. v. N. Y. (1900), 176 U. S. 335, 349, 20 S. Ct. 460, 44 L. Ed. 492;

Backus v. Fort Street Union Depot Co. (1898), 169 U. S. 557, 568, 18 S. Ct. 445, 42 L. Ed. 853;

Chicago etc. Co. v. Chicago (1896), 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979;

Monongahela Nav. Co. v. U. S. (1892), 148 U. S. 312, 327, 13 S. Ct. 622, 37 L. Ed. 463;

Shoemaker v. U. S. (1892), 147 U. S. 282, 298, 13 S. Ct. 361, 37 L. Ed. 170;

Pearson v. Yewdall (1877), 95 U. S. 294, 24 L. Ed. 436;

In re Condemnations, etc. (1920), 266 Fed. 105;

Cuyahoga River Power Co. v. City of Akron (1913), 210 Fed. 524;

Kaw etc. District v. Metropolitan Water Co. (1911), 186 Fed. 315, 319, 108 C. C. A. 393;

Chappell v. U. S. (1897), 81 Fed. 765, 26 C. C. A. 600;

In re Rugheimer (1888), 36 Fed. 371.

The books are replete with cases supporting the constitutionality of statutes by which the Legislature itself, or a subordinate tribunal conclusively determine the matters enumerated in section 1241 of the California Code of Civil Procedure. The following from the Appellate Courts of the various states are directly in point:

Kramer v. Cleveland and Pitts. R. R. Co. (1855), 5 Ohio St. 140, 146;

People v. Smith (1860), 21 N. Y. 595, 597;

Water Commissioners v. Johnson (1912), 86 Conn. 151, 84 Atl. 727;

County Court of St. Louis Co. v. Griswold (1874), 58 Mo. 175;

Water Works Co. v. Burkhart (1872), 41 Ind. 364;

Aldridge v. R. R. Co. (1832), 2 Stew. & Port. (Ala.), 199, 23 Am. Dec. 307;

Varick v. Smith (1835), 5 Paige Ch. (N. Y.) 137, 28 Am. Dec. 417;

Matter of Fowler (1873), 53 N. Y. 60, 62;

Zimmerman v. Canfield (1885), 42 Ohio St. 463;

Matter of Union Ferry Co. (1885), 98 N. Y. 140, 153;

Tait's Exec. v. Central Lunatic Asylum (1888), 84 Va. 271, 4 S. E. 697;

Sholl v. German Coal Co. (1887), 118 Ill. 427, 10 N. E. 199;

Moore v. Sanford (1890), 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151;

Fairchild v. City of St. Paul (1891), 46 Minn. 540, 49 N. W. 325;

Barrett v. Kemp (1894), 91 Ia. 296, 59 N. W. 76;

Paxton etc. Co. v. Farmers etc. Co. (1895), 45 Neb. 884, 64 N. W. 343, 50 Am. St. Rep. 585, 592;

Richland School Tp. v. Overmyer (1905), 164 Ind. 382, 73 N. E. 811;

Hayford v. Municipal Officers of Bangor (1907), 102 Me. 340, 66 Atl. 731, 11 L. R. A. (N. S.) 940;

So. Park Commissioners v. Montgomery Ward & Co. (1910), 248 Ill. 299, 93 N. E. 910, 21 Ann. Cas. 127;

Westport Stone Co. v. Thomas (1911), 175 Ind. 319, 94 N. E. 406, 35 L. R. A. (N. S.) 646;

Bd. Water Commissioners v. Manchester (1915), 89 Conn. 671, 96 Atl. 182, affirmed in *Manchester v. Board of Water Commissioners* (1915), 241 U. S. 649, 36 S. Ct. 552;

Dist. of Columbia v. Washington S. & O. (1915), 43 App. Cas. 433;

Tracy v. Elizabethtown (1882), 80 Ky. 259, 265;

Smeaton v. Martin (1883), 57 Wis. 364, 371, 15 N. W. 403;

Boston v. Talbot (1910), 206 Mass. 82, 91 N. E. 1014;

Ford v. Chicago (1861), 14 Wis. 663;

Iron Railroad Co. v. City of Irontown (1869), 19 Ohio St. 299, 304;

Wisconsin Water Company v. Winans (1893), 85 Wis. 26, 54 N. W. 1003, 39 Am. St. Rep. 813;

City of Philadelphia v. Ward (1896), 174 Pa. St. 45, 34 Atl. 458;

Chicago etc. Co. v. Mason (1909), 23 S. Dak. 564;

See note Ann. Cas. 1913a, p. 1256.

The constitutional principles governing the exercise of the right of eminent domain are

learnedly and elaborately stated in *People v. Smith* (1860), 21 N. Y. 595, 597, where the court says:

> "The question then is, whether the state, in the exercise of the power to appropriate the property of individuals to a public use, where the duty of judging of the expediency of making the appropriation, in a class of cases, is committed to public officers, is obliged to afford to the owners of the property an opportunity to be heard before those officers when they sit for the purpose of making the determination. I do not speak now of the process for arriving at the amount of compensation to be paid to the owners, but of the determination whether under the circumstances of a particular case the property required for the purpose shall be taken or not; and I am of opinion that the state is not under any obligation to make provision for a judicial contest upon that question. The only part of the Constitution which refers to the subject is that which forbids private property to be taken for public use without compensation, and that which prescribes the manner in which the compensation shall be ascertained. It is not pretended that the statute under consideration violates either of these provisions. There is therefore no constitutional injunction on the point under consideration. *The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the Legislature. It may be exercised by means of a statute which shall at once designate the property to be appropriated*

and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made. And where the power is committed to public officers, it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority.

"The constitutional provision securing a trial by jury in certain cases, and that which declares that no citizen shall be deprived of his property without due process of law, have no application to the case. The jury trial can only be claimed as a constitutional right where the subject is judicial in its character. The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are the attributes of political sovereignty, for the exercise of which the Legislature is under no necessity to address itself to the courts. In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property upon some view of public policy, where it could not

be said to be taken for a public use. (*The People v. The Mayor of Brooklyn*, 4 Comst. 419; *Taylor v. Porter*, 4 Hill 140; *Wynehamer v. The People*, 3 Kern. 378.)

"It follows from these views that it is not necessary for the Legislature in the exercise of the right of eminent domain, either directly, or indirectly through public officers or agents, to invest the proceeding with the forms or substance of judicial process. It may allow the owner to intervene and participate in the discussion before the officer or board to whom the power of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the Legislature shall in its discretion prescribe." (Italics ours.) (Pp. 597-599.)

The only cases in which it has been held that the property owner may question the necessity of taking any or all of the property sought to be taken are cases where the State Constitution required the question to be submitted to a court or jury or are cases where the Legislature has authorized only the taking of such property as is necessary. It has never been held that the property owner may question the necessity of taking any or all of the property sought to be condemned in a case where the

Legislature itself has determined the necessity or has delegated that power to an inferior tribunal. An examination of those decisions from which it might appear upon cursory reading that it was held that the question of necessity was a judicial one will disclose that the question in reality considered and discussed was whether or not the use for which the property was sought to be taken was in fact a public one, or will disclose that the Legislature had expressly made the determination of the question itself a judicial one to be determined by the court.

The fear of counsel, expressed several times in their brief, in substance that the effect of the *proviso* of section 1241 of the California Code of Civil Procedure is to substitute the arbitrary and capricious action of a board of supervisors for a judicial investigation, should at least be somewhat allayed by the language of this court in *Kentucky R. R. Tax Cases* (1885), 115 U. S. 321, 6 S. Ct. 57, 29 L. Ed. 414, where it is said:

> "But the same suppositions may be indulged in, in opposition to all contrary presumptions, with reference to the final action of any tribunal appointed to determine the matter, however carefully constituted, and however carefully guarded in its procedure, and whether judicial or administrative. Such possibilities are but the necessary imperfections of all human institu-

> tions, and do not admit of remedy; at least no revisory power to prevent or redress them enters into the judicial system, for, by the supposition, its administration is itself subject to the same imperfections." (P. 335.)

THE AMENDMENT OF 1918 TO THE CALIFORNIA CONSTITUTION.

Counsel quote an amendment to the California Constitution adopted by a vote of the people November 5, 1918, and argue therefrom that under the California Constitution the determination of the matters enumerated in the *proviso* to section 1241 is a judicial question.

We are at a loss to understand what this amendment has to do with this case in this court, particularly in view of the fact that it was adopted after this case had been on trial for over a month. [Tr. Vol. I, fol. 640 and Vol. III, fol. 3259.]

Whether the statute in question violates any provision of the Constitution of California does not concern this court. The state court's construction of its own Constitution is accepted by this court. Nothing appears in the opinion of the District Court of Appeal herein indicating that that court considered section 1241 repugnant to the State Constitution. Further, as the constitutional provision became effective after the resolutions had served their purpose

as evidence, it could have no bearing on the value of such resolutions as evidence. Upon a reading of the amendment it is at once apparent that the words "an adjudication that there is no necessity for taking the property" refer to those cases in which, under section 1241, there may be an adjudication that there is no necessity for taking the property. Under section 1241, if the legislative body of the county, city and county, or incorporated city or town does not determine the necessity for taking the property by a two-thirds vote, such necessity must be determined by the court. Also, when the property to be taken lies outside of the territorial limits of the public corporation, or when a drainage, irrigation, levee or reclamation district, mentioned in the Constitution, seeks to condemn, the necessity for the taking must be determined by the court. It is clear that it is to a taking in these cases that the provision of the Constitution refers.

However, this discussion is of no interest to this court for, as already pointed out, the District Court of Appeal in this case held that under the Constiution and laws of California a determination of the matters enumerated in the *proviso* of section 1241 is a legislative function. This court, as it has repeatedly held, will accept the state court's construction of the State Constitution and statute so long as there is no

conflict with the Federal Constitution. That there is no such conflict and that a determination of the matters enumerated in the *proviso* by the Legislature or by a subordinate tribunal does not violate the Federal Constitution is amply sustained by the authorities already referred to. (*Bragg v. Weaver* (1919), 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135.)

The Holding That the Resolutions Were Prima Facie Evidence.

Neither is there any merit in the argument of counsel that the ruling of the trial court holding the resolutions of the Board of Supervisors *prima facie* evidence of the necessity deprived their clients of their property without due process. That a statute or decision declaring certain facts *prima facie* evidence of other facts does not violate the Federal Constitution is apparent from the many decisions referred to in the brief of plaintiffs in error. (Brief, Plaintiffs in Error, pp. 42-65.)

The Legislative Body Does Not Determine That the Use Is Public.

Throughout the brief of plaintiffs in error the assertion is made that under the *proviso* the legislative body conclusively determines that property is taken for a public use. Counsel are in error. A cursory reading of the section will

convince the court that subdivision 1 provides for the determination by the court of whether the use is public and that the *proviso* does not in any manner concern itself with this question. Assuming, as they do, that the *proviso* authorizes the conclusive determination by the legislative body, of whether the use is public, counsel erect a structure of argument apparently convincing to themselves that the *proviso* operates to deprive their clients of due process of law. The fact that the *proviso* does not authorize the legislative body to determine conclusively, or at all, the question of public use makes manifest the falsity of the argument.

The Holding That the Determination of Necessity Is a Legislative Function.

Counsel argue that under the California law prior to this case the decision of the matters enumerated in the *proviso* of section 1241 was a judicial function; that the court in this case held it to be a legislative one; that therefore, by some mental complex, unexplained and unexplainable, plaintiffs in error are deprived of their property without due process of law. That the California courts did not for the first time in this case hold that the decision of these questions is a legislative function is apparent from *Wulzen v. Board of Supervisors* (1894), 101 Cal. 15, 35 Pac. 353, 4 Am. St. R. 17,

quoted from by the District Court of Appeal. [Tr. Vol. III, fols. 4274-4275.] However this may be, the only matter of importance to this court in this behalf is that it was held to be a legislative function in this case, for it is the settled rule of this court in cases of this kind to accept the construction placed by the courts of the state upon their own Constitution and statutes. (*Backus v. Fort Street Union Depot Co.* (1898), 169 U. S. 557, 18 S. Ct. 445, 42 L. Ed. 853.) The language of the court in the Backus case is peculiarly applicable to counsel's contention that the Appellate Court in this case held that the decision of the matters enumerated in the *proviso* was a legislative function, contrary to the previous decisions of the California courts, and that thereby plaintiffs in error were denied due process of law. The court declared:

> "His contention, however, is that the true construction of the Constitution and laws of the state, as settled by repeated decisions of its Supreme Court, was wholly disregarded in this case, and that by reason thereof the respondents were denied that equal protection of the laws which is guaranteed by the 14th Amendment to the Federal Constitution. * * *
>
> "But it is insisted that those proceedings were not so warranted; that the settled, uniform, and unreversed construction thereof by the Supreme Court of the state

theretofore forbade them, and hence there was a discrimination against the respondents, and they were denied that equal protection of the laws which the Federal Constitution guarantees. Thus, for instance, it is insisted that the previous rulings of the courts, both trial and supreme, had been to the effect that a jury called under these condemnation statutes was a jury of inquest and not a trial jury, whereas in this case the ruling was practically to the contrary, and the respondents were compelled to submit their rights to a trial jury subject to the control of the presiding judge, as in ordinary common-law cases. We deem it unnecessary to review the many authorities from the Supreme Court of Michigan cited by counsel, or determine whether the ruling in this case as to the methods of procedure and the true construction of the statute is or is not in harmony with prior decisions of that court. Accepting the contention of counsel, that in this case the Supreme Court of the state has put a different construction on the state statutes from that therefore given, and has sustained modes of procedure different from those which had previously obtained, still it does not follow that this court has a right to interfere and say that the present ruling is erroneous and the prior construction correct, or that the change of construction works a denial of any fundamental rights. There is no vested right in a mode of procedure. Each succeeding Legislature may establish a different one, providing only that in each is preserved the essential elements of protection. The fact that one construction has been placed upon a statute by the highest court of the

state does not make that construction beyond change. Suppose it were true, in the fullest sense of counsel's contention, that for a series of years the courts had ruled that the jury in condemnation cases was a jury of inquest, or in the nature of a sheriff's jury—one determining for itself all matters of law and fact, and that in this case, for the first time, they held otherwise, and that such jury was a common-law jury, subject to be controlled by the presiding judge, whose duty it was to determine all questions of law, and still, whatever might be thought of the propriety of such a change of construction, there is in it nothing to justify this court in reversing the judgment of the state court and denying the correctness or validity of this last ruling. We fail to see why the presence of the judge with this jury, his assumption of power to control its proceedings, his instructions to it on questions of law, necessarily vitiated the proceedings. Grant that such a course had never been taken before; grant that it had never been held to be a proper proceeding; grant that it was unexpected by counsel,—and yet if the judge's rulings and instructions were in themselves correct, and the propriety of his presence and control be held by the Supreme Court of the state warranted by the statutes, we do not perceive that any right possessed under the Constitution of the United States has been violated." (Pp. 566, 569-571.)

The only conclusion that can be drawn from the foregoing is that section 1241 of the California Code of Civil Procedure, as amended, is valid and constitutional and applicable to the

case at bar, wherein the property owners were not accorded any notice or hearing by the Board of Supervisors on the determination of the matters enumerated in the proviso of that section.

THIRD.

Plaintiffs in Error Were Not Denied the Equal Protection of the Law.

It is argued that "the different treatment accorded to the four classes described in said section 1241, namely: When the resolution is adopted by a two-thirds vote, and when not; and when the land sought to be condemned is within the territorial limits of the political subdivision seeking to condemn, and when not" denies plaintiffs in error the equal protection of the law. (Brief, Plaintiffs in Error, p. 66.)

THE POWER EXERCISED IN ENACTING THIS STATUTE IS NOT CONTROLLED BY THE FOURTEENTH AMENDMENT.

The obvious answer to this contention of plaintiffs in error is that the property owner has no interest or right whatever in how, or in what manner the necessity for the improvement, the land necessary therefor, or its location are determined. If the Legislature may designate by statute the property to be appropriated or may delegate that power to a subordinate tri-

bunal, as it has been repeatedly held it may do, without notice or hearing to the land owner, the property owner is not denied the equal protection of the law if his property is selected in a manner different from that by which his neighbor's is selected. (*Bragg v. Weaver* (1919), 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135; *Secombe v. R. R. Co.* (1874), 90 U. S. 108, 117, 23 Wall. 108, 23 L. Ed. 67; *Boom v. Patterson* (1878), 98 U. S. 403, 25 L. Ed. 206.) He is denied nothing. On the contrary, he is given privileges he does not otherwise have, if the Legislature says, as it has done in California, the necessity for taking property must be determined by two-thirds vote of the legislative body seeking to condemn. The power to select necessarily includes the lesser power of determining the mode of selection.

There is no limitation on the power of the Legislature as to the mode of exercising the right of eminent domain if the purpose be a public one and just compensation be paid or tendered to the owner. (*Secombe v. Milwaukee Etc. R. Co.* (1874), 90 U. S. 108, 117, 23 Wall. 108, 23 L. Ed. 67.)

Mr. Cooley, in his work on Constitutional Limitations, 7th Ed., p. 555, says:

> "The Legislature may therefore prescribe or authorize different laws of police, *allow the right of eminent domain to be exercised*

in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the state Constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle." (Italics ours.)

And at page 777 Mr. Cooley says:

"The authority to determine in any case whether it is needful to permit the exercise of this power must rest with the state itself; and the question is always one of strictly political character, not requiring any hearing upon the facts or any judicial determination. Nevertheless, when a work or improvement of local importance only is contemplated, the need of which must be determined upon a view of the facts which the people of the vicinity may be supposed best to understand, the question of necessity is generally referred to some local tribunal, and it may even be submitted to a jury to decide upon evidence. But parties interested have no constitutional right to be heard upon the question, unless the state Constitution clearly and expressly recognizes and provides for it. On general principles, the final decision rests with the legislative department of the state; and if the question is referred to any tribunal for trial, the reference and the opportunity for being heard are matters of favor and not of right. The state is not under any obligation to make provision for a judicial contest upon that question. And where the case is such that it is proper to delegate to

individuals or to a corporation (a) the power to appropriate property, it is also competent to delegate the authority to decide upon the necessity for the taking."

The conclusive reply to this contention of plaintiffs in error is set forth in *Southern R. Co. v. Memphis* (1912), 126 Tenn. 267, 148 S. W. 662, Ann. Cas. 1913 E. 153, 41 L. R. A. (N. S.) 828, in the following statement:

"But all other incidents of the taking are political questions, for the determination of the sovereign, and not judicial questions, for the determination of the courts. Selecting the property to be taken, as contradistinguished from similar property in the same locality, determining its suitableness for the use to which it is proposed to put it, as well as deciding the quantity required, are all political questions, which inhere in and constitute the chief value of the power to take. This power would be a vain and empty thing, if the owner could contest the advisability of taking his property rather than his neighbor's, or if he could interpose as a defense to the taking that other property could be found which would suit the public purposes better, or that he, the owner, was of opinion and could prove that the public needed more or less than the quantity proposed to be taken. The power to take would be of small value, if the thing to be taken, in its quantity, quality, and locality, could be determined by another and adverse interest. The authorities seem to be in harmony, some of which are: Anderson v. Turbeville, *supra;* Shoemaker v. United States, 147 U. S. 282, 13 S. Ct.

361, 37 U. S. (L. ed.) 170; Boom Co. v. Patterson, 98 U. S. 406, 25 U. S. (L. ed.) 206; United States v. Gettysburg Electric Ry. Co., 160 U. S. 668, 16 S. Ct. 427, 40 U. S. (L. ed.) 576; Kohl v. United States, 91 U. S. 367, 23 U. S. (L. ed.) 449; United States v. Fox, 94 U. S. 320, 24 U. S. (L. ed.) 192; 10 Am. & Eng. Enc. of Law (2d ed.) 1069; Illinois Cent. R. Co. v. Chicago, 141 Ill. 602, 30 N. E. 1044. 17 L. R. A. 530.

"Hence, it has been held that a particular property belonging to a particular citizen can be selected directly for the public use by legislative enactment. Anderson v. Turbeville, *supra;* Shoemaker v. United States, *supra;* Memphis State Line R. Co. v. Forest Hill Cemetery Co., *supra.* Public parks are for the benefit of the public, and property taken for such uses falls within a proper exercise of the power of eminent domain. Memphis v. Hastings, *supra;* Shoemaker v. United States, *supra;* United States v. Gettysburg Electric Ry. Co., *supra.*

"The Southern Railway's terminals and switch-yards are now devoted to a public use, so selected and set apart by proper legislative authority; and it is well settled that, before such property can be taken for another and inconsistent public use, there must be express or plainly implied legislative warrant for so doing. Memphis State Line R. Co. v. Forest Hill Cemetery Co., *supra;* 1 Lewis on Em. Dom. arts. 266, 269, 276; 15 Cyc. 612, 614. But the Legislature must have known that all of the property of the Southern Railway Company, including its switchyards in the city of Memphis, which is employed in commercial transportation, is devoted to a public use inconsist-

ent with the use of the same property for a public park; and therefore, when by the act in question, it authorized the city to acquire these yards for parks, it expressly authorized the taking for the other and inconsistent use. So we have a legislative selection of this particular property, already devoted to another and inconsistent public use, directly made by special enactment, which necessarily includes express authority to take it and devote it to the other and inconsistent use.

"That such a selection is not condemned by section 8 of article 1, section 21 of article 1, of the Fourteenth Amendment to the Constitution of the United States, follows naturally from what has been said heretofore respecting the origin, extent, and nature of the power of eminent domain. It exists outside and independent of the Constitution.

"The reasons which support such an act upon the part of the sovereign power are wholly dissimilar to the reasons which strike down arbitrary selections and classifications as between citizens. It does not require a reason for the selection of property for public uses other than the judgment of the sovereign power expressed in the legislative enactment which directs the taking. A law authorizing a particular person to borrow money at a rate of interest forbidden by law to all others, as in McKinney v. Memphis Overton Hotel Co., 12 Heisk. (Tenn.) 104; a law applying to a particular class of minors and the management of their estates, and not to others, as in Jones' Heirs v. Perry, 10 Yerg. (Tenn.) 60, 30 Am. Dec. 430; a law singling out a particular sheriff, and requiring a duty of him under a penalty

for failure to perform it, as in Alexandria v. Dearman, 2 Sneed (Tenn.) 104; a law providing that suits in which the venue has been changed may be moved back to the courts where they were instituted upon affidavits which could only be made by 'unconditional union men,' as in Brown v. Haywood, 4 Heisk. (Tenn.) 357; a law providing that cities having a certain population and over may sue without giving bond for cost, as in Memphis v. Fisher, 9 Baxt. (Tenn.) 240; a law which deprived lunatic intestates from transmitting their property to their heirs or distributees, as in Stratton Claimants v. Morris Claimants, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70; a law applying to counties of a certain population by the census of 1890, as in Sutton v. State, 96 Tenn. 696, 36 S. W. 697, 33 L. R. A. 589; a law which forbids a barber to keep his bathroom open on Sunday, and does not prohibit other owners of public baths from doing the same thing, as in Ragio v. State, 86 Tenn. 272, 6 S. W. 401; a law making it unlawful for a corporation to discharge an employee for voting or not voting at an election, which does not apply to any other citizen, as in State v. Nashville, C. & St. L. R. Co., 124 Tenn. 1, Ann. Cas. 1912D 805, 135 S. W. 773; a law which exempts the city of Memphis from liability for neglecting its public streets, as in Fleming v. Memphis, 126 Tenn. 331, 148 S. W. 1057, are each and all violative of the constitutional provisions last above referred to, and furnish typical examples of the application of those constitutional inhibitions against class legislation. The protection which the organic law affords to a citizen against arbitrary discrimination in favor of other citi-

zens, or a particular class of citizens arbitrarily selected, is the same thing in the Constitution which forbids the sovereign power to take the property of the citizen for private purposes at all, and which affords the guaranty of the equal protection of the laws. But it is obvious that the selection of a particular piece of property by the sovereign for public purposes falls within and is governed by an entirely different principle from that controlling the cases referred to. The power to take for public purposes necessarily includes the power to select that which is to be taken." (Pages 282-286.)

A pertinent case is *Kennebec Water District v. Waterville* (1902), 96 Me. 234, 52 Atl. 774, in which the court answered a contention similar to the one here made, as follows:

"III. The third section of the act incorporating the Kennebec Water District provides, that if any person sustaining damages and said corporation shall not mutually agree upon the sum to be paid therefor, such person may cause his damages to be ascertained in the same manner and under the same conditions, restrictions and limitations as are or may be prescribed in cases of damages by the laying out of highways. This gives to the owner of property taken the ultimate right upon appeal to have his damages assessed by a jury. Section five of the same act provides that if the trustees of the water district fail to agree with the Maine Water Company, the damages shall be assessed by appraisers to be appointed by the court upon a bill in equity to be instituted by the water district.

"It is claimed by the defense that the different tribunals thus provided for the assessment of damage is a violation of the Fourteenth Amendment of the Federal Constitution, which provides that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' In the case at bar the act of incorporation does not deny to any person, or to the Maine Water Company, the equal protection of the laws. It provides to each person who sustains damages and to the Maine Water Company just compensation. There is no discrimination or inequality in that respect. No different rule is prescribed for the estimation of just compensation in case of individuals, and in case of the Maine Water Company. The act provides for a competent and impartial tribunal in each case with the right of the property owner to appear and be heard. We think that this is all that is required by the terms of the amendment to the Federal Constitution above referred to. The only difference as to the award of compensation is one of procedure. As has already been shown the Legislature has entire discretion to designate any impartial tribunal to assess compensation, whether jury, commissioners or appraisers. We perceive no reason for precluding the Legislature from prescribing in the same act for the assessment of compensation by different tribunals for different classes of property taken, nor are we aware of any decision of any court holding that the Legislature is so precluded. Ordinarily the compensation for tangible property taken may properly be determined by a jury; but when, as in the case at bar, the property and franchises of a

large corporation are taken for public uses, and the value, not only of tangible property, but of the franchise, rights, privileges and contracts are factors in determining the amount of compensation to be paid, the Legislature may well determine that commissioners or appraisers, the members of which have peculiar skill and experience in such matters, can, better than a jury, do exact justice to the corporation whose property has been condemned and taken.

"We are of the opinion that the act here in question by prescribing a different tribunal for fixing the amount of just compensation to the Maine Water Company than that prescribed for fixing the compensation to other parties is not 'without due process of law', and does not deny to any person or to the Maine Water Company, 'the equal protection of the laws', and is not repugnant to the Fourteenth Amendment of the Federal Constitution." (Pages 251, 252.)

See also, Missouri v. Lewis,[1] (1879) 101 U. S. 22, 25 L. Ed. 989.

So, also, and for the same reasons, the Legislature of the state of California has the undoubted power to regulate the mode of exercising the right of eminent domain. If the matters enumerated in the proviso of section 1241 are not determined by a two-thirds vote of a Board of Supervisors and a further hearing is allowed in court, this fact does not derogate in the least from the authority of a decision by a two-thirds vote made conclusive by the statute.

The reasoning of this court in *Cincinnati Street R. Co. v. Snell* (1904), 193 U. S. 30, 36, 24 S. Ct. 319, 48 L. Ed. 604, in which it was contended that the provision for a change of venue for local prejudice made by O. Rev. Stats., section 5030, where the opposite party is a corporation with more than fifty stockholders, having its principal place of business in the county in which the action is pending, without conferring an equal right on the corporation, violated the constitutional guaranty of the equal protection of the laws, is directly applicable here. The court reasoned thus:

> "The proposition to which the case reduces itself is therefore this: That although the protection of equal laws equally administered has been enjoyed, nevertheless there has been a denial of the equal protection of the law within the purview of the 14th Amendment, only because the state has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the same forum, although as to both persons the law has afforded a forum in which the same and equal laws are applicable and administered. But it is fundamental rights which the 14th Amendment safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been de-

nied because the state has deemed best to provide for a trial in one forum or another. It is not, under any view, the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail.

"It follows that the mere direction of the state law that a cause, under given circumstances, shall be tried in one forum instead of another, or may be transferred when brought from one forum to another, can have no tendency to violate the guaranty of the equal protection of the laws where in both the forums equality of law governs and equality of administration prevails. In *Iowa C. R. Co. v. Iowa,* 160 U. S. 393, 40 L. Ed. 469, 16 Sup. Ct. Rep. 360, this court said:

" 'But it is clear that the 14th Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another.'" (Pages 36, 37.)

The situation before this court in *Pittsburg etc. R. Co. v. Backus,* (1894), 154 U. S. 421, 14 S. Ct. 1114, 38 L. Ed. 1031, is particularly

analagous here. The facts appear in the statement of Mr. Justice Brewer as follows:

> "On March 6, 1891, the Legislature of the state of Indiana passed an act entitled 'An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency' (Laws 1891, pp. 199-291) which, expressly repealing 'all laws and parts of laws within the purview of this act,' provided in itself a complete and comprehensive system of taxation. By it all property of individuals and ordinary corporations was subject to valuation and assessment by county officers, while the assessment of railroad property was committed to a state board of tax commissioners, composed of the governor, secretary of state, auditor of state, and two appointees of the governor. To this board, in addition to the assessment of railroad property, was given the duty of equalizing the assessment of real estate throughout the state, as well as of entertaining appeals from the decisions of the several county boards." (Pages 421-2.)

The court held:

> "Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so,

> and the power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing. Prior to the passage of the Court of Appeals Act by Congress, in 1891, a litigant in the Circuit Court, if the amount in dispute was less than $5000, was given but a single trial and in that court, while if the amount in dispute was over that sum the defeated party had a right to a second hearing and in this court. Did it ever enter into the thought of any one that such classification carried with it any denial of due process of law?" (P. 427.)

In *Kentucky R. R. Tax Cases* (1885), 115 U. S. 321, 6 S. Ct. 57, 29 L. Ed. 414, this court was considering a Kentucky statute providing for the assessment of railroad property in a different manner from property of other corporations. In stating and denying the contention of the plaintiffs in error, it was said:

> "The plaintiffs in error, however, did interpose a defense below, legitimate in itself, and arising under the Constitution of the United States, namely, that in the proceedings of the board of railroad commissioners, resulting in the valuation and assessment, under the Act of April 3, 1878, they were severally denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution. As

this defense was overruled by the Court of Appeals of Kentucky, another Federal question is presented which we are bound now to examine and decide.

"The discrimination against railroad companies and their property, which is the subject of complaint, as being unjust and unconstitutional, arises from the fact that, in the legislation of Kentucky on the subject, railroad property, though called real estate, is classed by itself as distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining its value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas and water companies. These latter report to the auditor the total cash value of their property, and pay into the treasury as a tax, upon each $100 of its value, a sum equal to the tax collected upon the same value of real estate; and their reports and valuations are treated as complete and perfect assessments, not subject to revision by any board or court, and conclusive upon the taxing officers.

"But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the con-

stituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the Legislature has seen fit to impose.

"So, the fact that the Legislature has chosen to call a railroad, for purposes of taxation, real estate, does not identify it with farming lands and town lots, in such a sense as imperatively to require the employment of the same machinery and methods for all, in the process of valuation for purposes of taxation. Calling them by the same name does not obliterate the essential differences between them, and accordingly, it is not insisted on in argument, as an objection to the system, that a railroad running through several counties is valued and taxed as a unit and by a special board organized for that purpose, while other real estate is valued in each county by assessors. The final point of objection seems to be reduced to this. In the case of ordinary real estate, it is said, when the assessor has made his valuation, it is submitted to a board of supervisors, who may change the valuation, but not so as to increase it, without notice to the taxpayer, and an opportunity for a formal hearing, upon testimony to be adduced under oath, and with a right of appeal on his part, first, to a county judge, and, again, if the amount of the tax is equal to fifty dollars, to the

Circuit Court. This is contrasted with the proceeding in the case of railroad property before the board of railroad commissioners, in which it is alleged there is no notice of an intended change in the valuation returned by the company, and no appeal allowed if it is increased.

"The discrimination, however, is apparent rather than real. An examination of the statutes shows, that the original valuation of the assessor, in case of ordinary real estate, is conclusive upon the taxpayer, no matter how unsatisfactory; and the appeal allowed is only from the action of the board of supervisors in case they undertake to increase the valuation made by the assessor. But in the case of railroad property, no board has authority to increase the original assessment made by the railroad commissioners, and there is, therefor, no case for an appeal similar to that of the owner of ordinary real estate.

"But were it otherwise, the objection would not be tenable. We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws does not require, in any case, an appeal, although it may be allowed in respect to other persons, differently situated. This was expressly decided by this court in the case of *Missouri v. Lewis*, 101 U. S. 22, 30. It was there said by Mr. Justice Bradley, delivering the opinion of the court and speaking to this point, that, 'the last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of de-

> cision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress.' The right to classify railroad property, as a separate class, for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the Constitution of the state in its Legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws." (Pp. 336-339.)

See also, the very late case of *Southern Railway Co., v. Watts* (Jan. 2, 1923), U. S. Adv. Ops. 1922-23, 199 in which this court said:

> "Differences in the machinery for assessment or equalization do not constitute a denial of equal protection of the laws." (P. 202.)

The right of eminent domain, as said in *People v. Smith* (1860), 21 N. Y. 595, 597, stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are the attributes of political sovereignty, and differences in the machinery for the determination of necessity do not constitute a denial of equal protection of the laws.

It has been repeatedly held by this court that the fact that one person may be prosecuted by information while another may be prosecuted by indictment does not contravene the Fourteenth Amendment. (Hurtado v. Cal. (1883), 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232; *Maxwell v. Dow* (1899), 176 U. S. 581, 598, 20 S. Ct. 448, 44 L. Ed. 597.)

A law denying the right of an individual in all criminal cases, not capital, to have a jury composed of twelve jurors does not contravene the Fourteenth Amendment. (*Maxwell v. Dow* (1899), 176 U. S. 581, 598, 20 S. Ct. 448, 44 L. Ed. 597.) The court in this case said:

> "As was stated by Mr. Justice Brewer, in delivering the opinion of the court in *Brown v. New Jersey*, 175 U. S. 172, the state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections." (P. 605.)

The Fourteenth Amendment did not create new legal rights. It operates on the legal rights existing at its adoption. *U. S. v. Cruickshank* (1875), 92 U. S. 542, 554, 23 L. Ed. 588. Property owners never having had the legal right

to have the necessity for taking their property determined upon notice and hearing, or in any particular manner, the fact that one class may be granted that privilege by the Legislature does not deny to a class not granted the privilege the equal protection of the law.

In *Backus v. Fort Street Union Depot Co.* (1898), 169 U. S. 557, 568, 18 S. Ct. 445, 42 L. Ed. 853, it is said:

> "Neither can it be said that there is any fundamental right secured by the Constitution of the United States to have the questions of compensation and necessity both passed upon by one and the same jury. In many states the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the Legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. *Mississippi & Rum River Boom Co. v. Patterson,* 98 U. S. 402, 406 (25: 206, 208); *United States v. Jones,* 109 U. S. 513, (27: 1015); *Cherokee Nation v. Southern Kansas Railway Company, supra.*" (Pp. 859.)

The assertion that because when the land is within the territorial limits of the political subdivisions the legislative body may, by four-fifths vote, conclusively determine the matters enum-

erated in the *proviso,* while when the land lies outside, such matters may not be so determined, plaintiffs in error are denied the equal protection of the law is fully answered by this court in *Gardner v. Mich* (1905), 199 U. S. 325, 26 S. Ct. 106, 50 L. Ed. 212, in this language:

> "The defendant further contends, as he contended in the Supreme Court of the state, that the act of the Michigan Legislature, creating the board of jury commissioners for Wayne county, in which the present trial occurred, denies to accused persons and other litigants in that county the equal protection of the laws. The ground of this contention is, that by the general laws of the state, the officers authorized to make and return the jury list were elected by the people in their several townships and in city wards (Const., Art. 11, Sec. 1; *People ex rel. Atty. Gen. v. Detroit,* 29 Mich. 108), and required that jurors should be of those who are assessed on the assessment roll; while, by the Wayne county jury law of 1893, as amended in 1895 (Pub. Acts. 1893, p. 337; *id.* 1895, p. 69), the jury lists are made up and returned by a board of seven jury commissioners, appointed by the governor, with the consent of the senate, and the names of persons to be returned need not appear on the assessment rolls. This difference between the general law relating to jury trials and the special law relating to Wayne county, it is said, constitutes a discrimination against the people of that county, and amounts to a denial to them

> of the equal protection of the law. This view does not commend itself to our judgment. It is fully met and shown not to be sound by the judgment in *Missouri v. Lewis* (*Bowman v. Lewis*), 101 U. S. 22, 31, 25 L. Ed. 989, where Mr. Justice Bradley, speaking for the court, and referring to the 14th Amendment, said:" (P. 333.)

The court then quotes at length from *Missouri v. Lewis.*

The rule that the Legislature may declare a finding of a subordinate tribunal conclusive evidence of any fact which it need not have required in the first place, recognized in the cases referred to by counsel for plaintiffs in error (Brief, Plaintiffs in Error, p. 44) is directly applicable here. The authorities already quoted demonstrate that the Legislature may conclusively determine the matters enumerated in the *proviso* of section 1241 of the California Code of Civil Procedure by statutory enactment, without notice or hearing to the property owner. It may, therefore, declare that the finding of such facts by a subordinate tribunal shall be conclusive evidence of such facts.

The necessity for a public improvement is not a matter in which the individual citizen or property owner has an interest different from or greater in degree than the public at large. Such necessity is a question of general public policy to be determined by the public's agent, the Leg-

islature, or its subordinate tribunal. It is an act of governmental administration. No authority has been produced and none can be found holding that a property owner must be given notice or hearing on whether an act of public administration shall be done. No authority can be found holding that the performance of an act of public administration in one manner under certain circumstances and in another manner under other circumstances constitutes a denial of the equal protection of the law.

The Classification Made Is Not Arbitrary or Unreasonable.

If it should be conceded, for the purpose of argument, that the Fourteenth Amendment limits the Legislature in prescribing the mode in which the matters enumerated in the *proviso* of section 1241 shall be determined, nevertheless, the statute under consideration does not deny the equal protection of the law.

It is elementary that the Fourteenth Amendment to the Constitution does not prohibit a state from classifying persons or property for purposes of legislation. A classification, to be obnoxious, must be arbitrary and destitute of reasonable basis. If any state of facts can be conceived that would sustain a classification, it is not arbitrary. It makes no difference that the facts may be disputed or their effect op-

posed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminatory and hostile legislation. (*Rast v. Van Deman etc. Co.* (1916), 240 U. S. 342, 36 S. Ct. 370, 60 L. Ed. 679, Ann. Cas. 1917B, 421; *Lindsley v. Natural etc. Co.* (1911), 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C 160; *Heisler v. Thomas Colliery Co.* (Nov. 27, 1922), U. S. Adv. Ops. 1922-1923, p. 119.)

Testing the statute under consideration by these principles, can it be said that the classification made is arbitrary and destitute of reasonable basis, or that one class is singled out for descriminatory and hostile legislation? The Legislature says that when the necessity for the taking is so obvious as to be recognized by a two-thirds vote of the legislative body of the political subdivision, the determination of such necessity by a two-thirds vote of that body is conclusive. It also says that when the necessity for the taking is not so obvious as to be recog-

nized by two-thirds of the legislative body of the political subdivision, the necessity shall be determined in a judicial proceeding in which the property owner shall be heard. The legislative body of a political subdivision of the state is presumed to have intimate knowledge of local conditions within the subdivision. Such knowledge may be derived from the individual personal knowledge of its members, or may be derived from statements made to it or to its members, either official or unofficially. Men are elected members of such bodies because of their familiarity with the conditions and wants of the subdivision. Information possessed by one member is, of course, at the disposal of all of the others. The statute merely says that when two-thirds of the members of such a body, exercising the knowledge of local conditions which they have, say that a public improvement is needed and that certain land must be acquired for that improvement, such determination is conclusive. Who is in any better position to determine such necessity than two-thirds of such a body?

Where citizens living in some part of the political subdivision desire a public improvement in that particular section but the necessity therefor is not so apparent that two-thirds of the legislative body is satisfied of it, the Legislature says such necessity shall be determined

in a judicial proceeding and the property owner shall have an opportunity of contesting it.

Is this classification so unreasonable and arbitrary as to be obnoxious? On the contrary, is it not a most reasonable and fair mode of determining the necessity for a public improvement?

The same argument applies to a taking outside of the territorial limits of the political subdivision. In such cases the necessity is determined in a judicial proceeding, irrespective of the views of the legislative body. This, for the reason that the legislative body has no interest in, is not presumed to know, and usually does not know conditions outside of its own political subdivision. There is nothing, we submit, unreasonable or arbitarary in such classification.

Whether the statute be considered as one prescribing the mode of exercising the sovereign power of eminent domain which is not subject to any constitutional limitation except that the purpose be public and compensation be made or tendered, or whether it is necessary that the Legislature observe reasonable limitations in exercising such power, the statute does not deny to any person the equal protection of the law.

FOURTH.

The Striking Out of the Special Defenses Did Not Prevent Plaintiffs in Error From Raising the Question Whether the Land Sought to Be Condemned Was Being Taken for a Public Use Authorized by Law.

The apparent theory of plaintiffs in error in urging that the trial court erred in striking the special defense set forth in the assignment of errors is that they were thereby denied the right of proving that the taking was not for a public use.

The record clearly shows that they were not denied this right. Each and every matter alleged in this special separate defense was an issue before the court under the allegations of the complaint and the denials and separate defenses of the amended answers which remained standing after this separate special defense was stricken out. Plaintiffs in error introduced a vast mass of evidence for the purpose of proving that the use was not a public one. Defendant in error in turn introduced a vast deal of evidence for the purpose of proving that the proposed use was public. The court found that the use for which the property was to be taken was a public use and the District Court of Ap-

peal upheld this finding. The evidence referred to is scattered throughout the transcript of the record in such fashion that it is impossible to directly refer to it. In view of the fact that the District Court of Appeal made this same statement, we trust we may be pardoned in not taking up the time of the court with unlimited references to the transcript. [Tr. Vol. III, fols. 4267, 4278-4280.]

We fail to see how under this condition of the record the due process of law clause of the Fourteenth Amendment was violated by the action of the court in striking out these special defenses. Plaintiffs in error were not denied any right under the Fourteenth Amendment.

It is to be observed that counsel do not say that the evidence demonstrates that the proposed taking was for a private use, nor do they say that they were denied the right to prove that the use was not public nor that defendant in error did not prove that the use was public. Their sole contention is that the mere striking from the pleadings of their special defenses denied their clients due process of law. Assuredly, if they were given every latitude in an attempt to prove that the use was private they are in no position to complain merely because their attempt was unsuccessful.

The District Court of Appeal, referring to these separate defenses, said:

> "While this contention is fully answered by the fact that the resolution was conclusive evidence of the taking being necessary, nevertheless, conceding such theory warranted by the alleged facts, it appears that every material issue tendered by the so-called separate defense was not only raised by the complaint and the answers thereto, but that in the trial thereof defendant, without objection or restriction, was accorded every opportunity, of which it availed itself, in offering evidence touching every matter contained in the pleading so stricken out by order of the court. There was no error in the ruling, but, conceding as much, it is impossible to perceive how defendants, under the circumstances, could have suffered any prejudice by reason thereof." (200 Pac., pp. 31, 32.)

The state court having found the facts to be as stated in this quotation, this court will accept such statement as true, for in cases of this kind coming from the Supreme Court of a state, questions of fact passed upon in the state court are not here open to review. (*Backus v. Fort Street Union Depot Co.* (1898), 169 U. S. 557, 18 S. Ct. 445, 42 L. Ed. 853.)

An examination of the special defenses stricken out will disclose that the sole issues raised by them were: The necessity for the highway; whether the purpose constituted a public use; and that the taking deprived plaintiff in error

of their property without due process of law and denied them the equal protection of the laws. Under the complaint, the answers and the separate defenses remaining after these were stricken, each of these matters was an issue before the court for hearing and determination. The questions of necessity and of public use were issues under paragraphs III and IV of the complaint, paragraph III of the amended answers of May K. Rindge and Rindge Company, and the special defense which remained in the pleadings. [Tr. Vol. I, fols. 48-50, 288-291, 324-327, 301-302, 337-338.] The issues, whether plaintiffs in error were deprived of their property without due process of law and whether they were denied the equal protection of the laws, were raised by a special defense which remained standing in the amended answers and was not stricken out. [Tr. Vol. I, fols. 302-303, 390-395, 405.]

We have demonstrated, we believe, that the striking of the special defenses set forth in the assignment of errors did not deprive plaintiffs in error of the right to show that the use for which the property was to be taken was not public, but, on the contrary, that they were accorded the widest latitude in such attempt. There is therefore no basis for their contention that they were denied due process of law in this behalf.

THE PROPERTY WAS TAKEN FOR A PUBLIC USE.

The property was taken for a public highway. It does not require statutory authority to demonstrate that a public highway is a public use. However, the Code of Civil Procedure of California, section 1238, provides,

> "Uses for which eminent domain may be exercised. Subject to the provisions of this title the right of eminent domain may be exercised in behalf of the following public uses: * * * 3. * * * roads, highways, bridges, streets and alleys, * * *."

That the taking of the particular public highway in question is for a public use cannot be seriously controverted. The trial court so found. [Tr. Vol. 1, fols. 390, 402-409, 595-603.] The District Court of Appeal upheld these findings. Under these circumstances what is the attitude of this court in determining whether the taking is for a public use? It is convincingly stated in *Hairston v. Danville & W. R. Co.* (1907), 208 U. S. 598, 28 S. Ct. 331, 52 L. Ed. 637, a proceeding by a railroad company for condemnation of land for a spur track, in this language:

> "The condemnation of land in this case has been held by the courts of Virginia to be authorized by the Constitution and laws of that state, and we have no right to review that aspect of the decision. The

law of Virginia permits no exercise of the right of eminent domain except for public uses. Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 61 L. R. A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; Dice v. Sherman (Va.), 59 S. E. 388. Therefore it must be assumed that this taking was held to be for public uses, although there was no specific finding of the fact, but only a general judgment of condemnation. The plaintiff in error, however, insists that the record in this case, which includes all the evidence, shows, unmistakably, that the taking was for private uses, and that the claim by the railway company, that the spur track was designed in part for public uses, is no better than a colorable pretense. We assume that, if the condemnation was for private uses, it is forbidden by the 14th Amendment. * * * But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected. Some cases illustrative of the

tendency of local conditions to affect the judgment of courts are Hays v. Risher, 32 Pa. 169; Boston & R. Mill Corp. v. Newman, 12 Pick 467, 23 Am. Dec. 622 (Conf. Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39); Turner v. Nye, 154 Mass. 579, 14 L. R. A. 487, 28 N. E. 1048; *Ex parte* Bacot, 36 S. C. 125, 16 L. R. A. 586, 16 S. E. 204; Dayton Gold & S. Min. Co. v. Seawell, 11 Nev. 394; Hand Gold Min. Co. v. Parker, 59 Ga. 419; Head v. Amoskeag Mfg. Co., 113 U. S. 9, 28 L. Ed. 889, 5 Sup. Ct. Rep. 441; Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676; Strickley v. Highland Boy Gold Min. Co., *supra;* Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140, 50 L. Ed. 696, 26 Sup. Ct. Rep. 353. The propriety of keeping in view by this court, while enforcing the 14th Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified, and acted upon in Fallbrook Irrig. District v. Bradley; Clark v. Nash; and Strickley v. Highland Boy Gold Min. Co.—*ubi supra.* What was said in these cases need not be repeated here. *No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws.* In Missouri P. R. Co. v. Nebraska, *ubi supra,* it was pointed out (p. 416) that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses

for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aerial bucket line; or the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the State Constitution, law, and court approve will be held to be forbidden by the 14th Amendment to the Constitution of the United States." (Italics ours.) (Pp. 605-607.)

In determining whether a particular use is public, this court stated the rule in *U. S. v. Gettysburg Electric R. Co.* (1895), 160 U. S. 668, 40 L. Ed. 576, as follows:

"In these Acts of Congress and the joint resolution the intended use of this land is plainly set forth. It is stated in the 2d volume of Judge Dillon's work on Municipal Corporations (4th Ed.), Sec. 600, that when the Legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one." (P. 680.)

Plaintiffs in error have presented nothing indicating that the highway in question is not a public use.

In *Shoemaker v. U. S.* (1892), 147 U. S. 282, 298, 13 S. Ct. 361, 37 L. Ed. 170, a proceeding to ascertain the compensation to be paid property owners for lands taken for a public park in the District of Columbia under an Act of Congress, this court, after citing cases said:

> "In these and many other cases it was, either directly or in effect, held that land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health, or business, is taken for a public use.
>
> "In the case cited from the Missouri reports, where the Legislature had authorized the appropriation of land for a public park for the benefit of the inhabitants of St. Louis county, situated in the eastern portion of the county, near to and outside of the corporate limits of the city of St. Louis, it was held that this was a public use, notwithstanding the fact that it would be chiefly beneficial to the inhabitants of the city, and that the act was not unconstitutional.
>
> "The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the Legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is ex-

> hausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made." (Pp. 297-8.)

See also:

> *Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co.* (1915), 240 U. S. 30, 32, 36 S. Ct. 234, 60 L. Ed. 507.

It is not essential that the entire community, or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use. (*Fallbrook Irrigation District v. Bradley* (1896), 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369.)

That plaintiffs in error were afforded every opportunity of showing that the property was not taken for a public use and, further, that the property was taken for a public use, has been demonstrated. There is, therefore, no basis for the contention that the use is not public or that plaintiffs in error were denied any right under the Federal Constitution by reason of the striking out of the special defenses.

Conclusion.

We cannot close this brief without remarking that these are among the many cases which should never have come before this court. If the constitutional questions raised were new and had never been before this court for adjudication there might be some justification for calling upon the time of this court for their decision but, as pointed out herein, they have been adjudicated many times by this court and by the courts of last resort of nearly all of the states adversely to the contention of plaintiffs in error. Particularly is the above true in view of the fact that the cases were tried on the theory that the statute in question was unconstitutional and void.

To recapitulate:

1. This court is without jurisdiction for the reason that a decision of the constitutional questions was rendered unnecessary by the view taken of the case by the learned District Court of Appeal.

2. California Code of Civil Procedure, section 1241, is not repugnant to the due process clause of the Fourteenth Amendment for the reason that a property owner in a proceeding to take his property for public use is not entitled to notice or hearing on the determination of (a) the necessity for the proposed improve-

ment, (b) the necessity of the particular property therefor, and (c) the location of the improvement.

3. Plaintiffs in error were not denied the equal protection of the law for the reason that (a) the mode of exercising the right of eminent domain not subject to constitutional limitation other than that the purpose be public and compensation made or tendered, (b) the classification made by section 1241 is not arbitrary or unreasonable, (c) plaintiffs in error were accorded the privilege which they assert the statute denies, that of notice and hearing on the questions enumerated in the *proviso* of section 1241.

4. A striking out of the special separate defenses did not prevent plaintiffs in error from introducing testimony for the purpose of proving that the use was not public.

There is, therefore, no ground for reversal and the judgment in each case should be affirmed.

Most respectfully submitted,

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